IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 1404, Misc.

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and each Circuit Judge in regular active service thereon,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION, PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND ARGUMENT IN SUPPORT THEREOF

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The Petitioners move the Court for leave to file the Petition for Writs of Mandamus and Prohibition hereto annexed; and further move that an order and rule be entered against the United States Court of Appeals for the Seventh Circuit, and each Circuit Judge in regular active service thereon, to show cause why writs of mandamus and prohibition should not be issued against them in accordance with the prayer of said Petition, and

why your Petitioners should not have such other and further relief in the premises as may be just and meet.

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ORDER BELOW

The order of the Court of Appeals for the Seventh Circuit, unpublished, appears as Appendix A hereto.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on February 2, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1651.

QUESTION PRESENTED

Whether Seventh Circuit Rule 28, which prohibits the publication of written "Orders" which set forth reasons for judgments, and further prohibits a litigant from citing as precedent and relying upon such orders, denies due process of law and violates First Amendment Rights?

CIRCUIT RULE INVOLVED

Circuit Rule 28 (The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the U.S.):

Policy

It is the policy of this circuit to reduce the proliferation of published opinions.

Publication

The Court may dispose of an appeal (1) by an order or (2) by an opinion, which may be signed or per curiam.

Orders shall not be published and opinions shall be published.

"Published" or "publication" means:

(1) Printing the opinion as a slip opinion;

(2) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested U.S. attorneys, departments and agencies and the news media;

(3) Permitting publication by legal publishing companies as they see fit; and

(4) Unlimited citation as precedent.

Unpublished Orders:

(1) Shall be typewritten and reproduced by copying machine;

(2) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and shall be available to the public on the same basis as any other pleading in the case;

(3) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth.

(4) Shall not be cited as precedent (a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose, except to support a claim of *res judicata*, collateral estoppel or law of the case.

Guidelines for Method of Disposition

Published opinions:

Shall be filed in signed or per curiam form in appeals which

(1) Establish a new or change an existing rule of law;

(2) Involve an issue of continuing public interest;

(3) Criticize or question existing law; or

(4) Constitute a significant and non-duplicative contribution to legal literature.

(a) by a historical review of law;

(b) by describing legislative history; or

(c) by resolving or creating a conflict in the law.

Unpublished orders:

(1) May be oral and delivered from the bench, which shall be recorded by the Clerk of the Court, or in writing with only, or little more than, the judgment rendered, in appeals which

(a) are frivolous or

(b) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(i) a controlling statute or decision determines the appeals;

(ii) issues are factual only and judgment appealed from is supported by evidence;

(iii) order appealed from is nonappealable or this Court lacks jurisdiction or appellant lacks standing to sue; or

(2) May be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(a) are not frivolous but

(b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

Responsibility for Determining Whether Disposition is to be by Order or Opinion

The determination to dispose of an appeal by unpublished order or published opinion shall be made by a majority of the panel rendering the decision.

The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

Effective Date

The effective date of this rule is February 1, 1973.

STATEMENT OF THE CASE

On July 2, 1975, the Secretary of State of Illinois revoked, pursuant to Illinois Revised Statutes, Chapter 95 1/2, Secs. 5-501 (a)(5) and (6), without prior hearing, petitioners' "dealer's certificate of authority" to operate Do-Right Auto Sales. Petitioners first learned of this revocation when an investigator pulled Do-Right's license off the wall and forced petitioners immediately to cease operating their business. On July 23, 1975, petitioners filed a civil action, No. 75 C 2421, in the United States District Court for the Northern District of Illinois, on their own behalf and on behalf of all others similarly situated, challenging the constitutional validity of the Illinois statute which permits revocation of licenses without prior hearings. The complaint sought, *inter alia*, injunctive relief. Judge Frank J. McGarr issued an order temporarily restraining the Secretary of State from revoking the petitioners' license without a prior hearing.

In conjunction with the civil action, petitioners filed a motion to convene a three-judge court to consider and determine the constitutionality of the challenged Illinois statute. On December 19, 1975, Judge Joel M. Flaum, to whom the civil action had been assigned, denied the motion to convene a three-judge court.

Petitioners subsequently filed in the United States Court of Appeals for the Seventh Circuit a petition seeking a writ of mandamus directing the District Court to order the convening of a three-judge court. Petitioners relied upon *Valentino v. Lynch*, No. 73-1089 (7th Cir.

June 8, 1973) (unpublished).[1] In response, the Attorney General of Illinois filed, pursuant to Seventh Circuit Rule 28, a "motion to strike" all references by petitioners to the *Valentino v. Lynch* "unpublished order".

The Seventh Circuit, pursuant to Circuit Rule 28, which prohibits the citation as authority or reliance upon unpublished orders, granted the "motion to strike" and denied, without comment, the petition for writ of mandamus.[2]

[1] This "unpublished order" is set forth as Appendix B hereto.
[2] The order is set forth in Appendix A hereto.

REASONS FOR GRANTING THE WRITS

I.

SEVENTH CIRCUIT RULE 28, WHICH PROHIBITS THE PUBLICATION OF WRITTEN "ORDERS" WHICH SET FORTH REASONS FOR JUDGMENTS, AND FURTHER PROHIBITS A LITIGANT FROM CITING AS PRECEDENT AND RELYING UPON SUCH ORDERS, DENIES DUE PROCESS OF LAW AND VIOLATES FIRST AMENDMENT RIGHTS.

Whether Circuit Judges should prepare written opinions is not at issue in this proceeding. The sole issue petitioners raise before this Court is the propriety of a Circuit Court of Appeals Rule which acts as a prior restraint on First Amendment rights, denies due process and undermines the case system by which American lawyers traditionally advocate their clients' causes and by which American jurists, legal scholars and practicing lawyers gauge and develop American law.

Seventh Circuit Rule 28 specifically prohibits the citation of "unpublished orders" as precedent: "(a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose, except to support a claim of *res judicata*, collateral estoppel or the law of the case." This same Rule prohibits publication of the written reasoning which often is incorporated into such "orders." While the Rule provides that unpublished orders ". . . shall be available to the public on the same basis as any other case," such orders must be ferreted out of court files without the aid of any subject index, annotation or digest. If, by serendipity, a relevant order is discovered, neither advocate nor judge is permitted to rely upon it.

The instant case presents a clear and compelling example of the injustice brought to bear by this Rule. Petitioners sought to rely upon *Valentino v. Lynch*, in which the Seventh Circuit ordered, by mandamus, the convening of a three-judge court in its underlying case, *Valentino v. Howlett, Secretary of State of Illinois*, No. 72 C 2941 (N.D. Ill.). In *Valentino v. Howlett*, the plaintiff challenged the constitutionality and sought to enjoin the enforcement of a similar Illinois statute by which the Secretary of State deprived persons of driver's "hardship" licenses without affording them procedural due process and equal protection. Petitioners considered, and continue to consider, *Valentino v. Lynch* to be a ruling "on all fours" with the instant case and, but for its unpublished status, a ruling which would be binding precedent upon the District Court. The Seventh Circuit, in its "Order" in *Valentino v. Lynch*, included a written statement (covering more than three single-spaced typewritten pages) of its reasons for issuing the mandamus. In so doing, the Seventh Circuit relied upon and interpreted four decisions of this Honorable Court as well as a Second Circuit decision. Because the *Valentino v. Lynch* "Order" was designated as an "Unpublished Order" pursuant to Seventh Circuit Rule 28, petitioners in the instant case were prohibited from citing it or relying upon it as precedent.

Circuit Rule 28, by prohibiting publication and citation of "orders" such as *Valentino v. Lynch*, constitutes a prior restraint upon freedom of speech. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Branzburg v. Hayes*, 408 U.S. 665 (1972). The impossibility of locating relevant cases among those unpublished decisions, along with the Rule 28 prohibition against the use of unpublished opinions as precedent, also impinges upon the

First Amendment right to petition the government for redress of grievances.

This Rule also carries serious consequences for the fair and equal administration of justice. The Seventh Circuit Rule proclaims as its rationale the "policy . . . to reduce the proliferation of published opinions."[3] Certainly this policy cannot outweigh the constitutional rights which this Rule impairs. As this Court stated in *Stanley v. Illinois:*

> . . . the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. (405 U.S. 645, 656 [1972])

cf. *Reed v. Reed*, 404 U.S. 71, 76 (1951).

The availability of and reliance upon judges' written reasons for their decisions also is essential to the stability of law. It is clear that if written opinions are

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[3] Petitioners question whether, in this age of computers and microfilm, the Seventh Circuit's concern over the proliferation of published opinions is not one that can be handled by advanced methods of technology and information handling rather than by restriction of output. See Sprowl, *Computer-Assisted Legal Research: Westlaw and Lexis*, 62 A.B.A.J. 320 (1976). As James N. Gardner has observed:

> "The concept of law has come a long way from the Dark Ages to the advanced jurisprudence of the American legal system. But the return path may be considerably shorter. It need not be taken, if we will heed Becarria's admonition to make of the law 'a book . . . sacred and open to all.' "

Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?* 61 A.B.A.J. 1224, 1227 (1975).

available and utilized in advocacy, the possibility of unannounced changes in the law is lessened. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). As Karl Llewelyn stated in *The Bramble Bush:*

> "whereas the courts might make records and keep them, but yet pay small attention to them; or might pay desultory attention; or might even deliberately neglect an inconvenient record if they should later change their minds about that type of case, the lawyer searches the record for convenient cases to support his point, presses upon the court what it has already done before, capitalizes the human drive toward repetition by finding, by making explicit, by urging, the prior cases . . . [precedent] . . . gives a basis from which men may predict the action of the courts; a basis to which they can adjust their expectations and their affairs in advance." (at 65-66)

In the instant case, the Seventh Circuit, by its Rule, has applied different law to petitioners than was applied to Valentino, although the legal issues are materially identical.[4] Inconsistent decisions (one published, one unpublished) resulting from a similar Ninth Circuit rule recently were brought to light in an American Bar Association Journal article. That article concluded:

> Writing in the 1760s, the Italian Jurist Cesare Becarria concluded that the most significant factor behind Europe's emergence from a dark age of lawless tyranny was not better rulers, better judges, or even better laws. It was rather "the art of printing, which makes the public, and not a few individuals, the guardians of the sacred laws."[5]

The Seventh Circuit Rule not only denies equal access to the law but precludes those who find it from using it on their behalf.[6] An impermissable system of private law, carefully guarded by a few judges, is created thereby.

[4] Despite the Rule's unequivocal prohibition against citation of "unpublished orders" as precedent, there are indications that the Rule is not uniformly followed by judges within the Seventh Circuit. For example, in *Love v. Howlett*, No. 75 C 1821 (N.D. Ill.), Love challenged the constitutionality of a different section of the same statute challenged in the instant case, which permitted the Secretary of State to revoke, without prior hearing, Love's driver's license. In his memorandum in support of his motion to convene a three-judge court, Love relied substantially upon *Valentino v. Lynch*. In Love's case, the citation of *Valentino v. Lynch* was not stricken, and the three-judge court was convened.

Another serious problem with the Rule, also raising important equal justice and due process questions, is its provisions for limited distribution. Ready knowledge of the existence of these unpublished orders, which contain important legal reasoning, is thereby restricted to a privileged few.

II.

THE RELIEF SOUGHT IS AVAILABLE ONLY IN THIS COURT.

The writs requested by petitioners should be granted pursuant to an exercise of this Court's appellate jurisdiction and supervisory power under 28 U.S.C. § 1651. This Petition challenges the validity of a Rule promulgated,

[5] Gardner, *supra* note 3, at 1227.

[6] The Seventh Circuit Rule permits citation by party litigants of unpublished orders in connection with claims of *res judicata* or collateral estoppel, but not for other purposes. Equal protection is thereby denied, both as to non-party litigants *vis-a-vis* party litigants and to party litigants who seek to cite the orders for other purposes. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Another equal protection problem is raised by the Rule's limited application to federal courts within the Seventh Circuit. Litigants and judges in other circuits and in state courts can cite and rely upon Seventh Circuit unpublished orders. See *Avco Corp. v. Aero Lodge No. 735, I.A. of M. & A.W.*, 390 U.S. 557, 559 (1968).

effective February 1, 1973, by a majority of the Seventh Circuit judges in regular active service.[7]

The writs requested are appropriate. Rules in other federal circuits and some state courts, similar to the Seventh Circuit Rule,[8] are coming under attack by members of the bar, and the validity and proper scope of such rules is an issue of great importance to the fair administration of justice.[9] Moreover, in the instant case, a single judge presently is exercising jurisdiction in a case involving a constitutional challenge to a state statute, which is required to be heard by three judges. Writs of Mandamus or Prohibition have previously been issued by this Court to remedy such circumstances.[10] Petitioner and the judges within the Seventh Circuit are prohibited by the Seventh Circuit Rule from utilizing as precedent the *Valentino v. Lynch* "Unpublished Order" which states clear reasons why the three-judge panel should be convened.

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[7] Each circuit is granted authority to promulgate its own rules pursuant to Rule 47 of the Federal Rules of Appellate Procedure. Unlike the Federal Rules of Appellate Procedure, neither this Court nor Congress approves the Circuit Rules.

[8] The First, Second, Fifth, Sixth, Eighth, Ninth and Tenth Circuits also have promulgated rules limiting publication of opinions. Many of these rules prohibit citation of unpublished orders or opinions as precedent, as does the Seventh Circuit Rule. Each of these differs in certain respects from the others, except for the identical Fifth and Eighth Circuit Rules. These nuances of difference raise additional due process and equal protection problems.

[9] In the January, 1976, issue of the American Bar Association Journal, two letters to the Editor, one from each Coast, applauded the Gardner article criticizing the Ninth Circuit Rule. 62 A.B.A.J. 6 (1976). See note 3, *supra*.

[10] *Ex Parte Northern Pacific Railway Co.*, 280 U.S. 142 (1929); *Ex Parte Cogdell*, 342 U.S. 163 (1951).

CONCLUSION AND PRAYER FOR RELIEF

Wherefore, Petitioners pray:

1. That writs of mandamus and prohibition issue from this Court directed to the Honorable United States Court of Appeals for the Seventh Circuit, and to each Circuit Judge in regular active service thereon, to show cause on a day to be fixed by this Court why mandamus and prohibition should not issue from this Court directing said respondents:

(a) to cease and desist from the enforcement of Seventh Circuit Rule 28;

(b) to repeal Seventh Circuit Rule 28;

(c) to vacate and expunge from the record the order of February 2, 1976, striking petitioners' reference to the unpublished order in *Valentino v. Lynch* and denying a petition for mandamus to the Honorable Joel M. Flaum, Judge of the United States District Court for the Northern District of Illinois;

(d) to consider, in light of *Valentino v. Lynch*, the aforesaid petition for mandamus to the Honorable Joel M. Flaum, Judge of the United States District Court for the Northern District of Illinois.

2. That petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

No. 76-1022

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, individually and on behalf of all others similarly situated,

Petitioners,

v.

HON. JOEL M. FLAUM, Judge of the United States District Court for the Northern District of Illinois; and MICHAEL J. HOWLETT, Secretary of State of Illinois,

Respondents.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

SUBMITTED: JANUARY 30, 1976
DECIDED: FEBRUARY 2, 1976

This matter comes before the Court on the "ORIGINAL PROCEEDING FOR A WRIT OF MANDAMUS" filed herein on January 8, 1976 by counsel for the petitioners; the "ANSWER OF RESPONDENT TO PETITION FOR WRIT OF MAN-

DAMUS" filed herein on January 29, 1976; and the "MOTION TO STRIKE" also filed herein on January 29, 1976 by counsel for the respondent, Michael J. Howlett, Secretary of State of Illinois. On consideration whereof,

IT IS ORDERED that the respondents' "MOTION TO STRIKE" all references made by the petitioners to the unpublished order in *Valentino v. Lynch* is hereby GRANTED pursuant to Circuit Rule 28.

IT IS FURTHER ORDERED that the aforesaid petition for writ of mandamus be, and the same is hereby, DENIED.

APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Before
HON. TOM C. CLARK, *Associate Justice**
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 73-1089

JOSEPH C. VALENTINO,

Petitioner,

v.

HON. WILLIAM J. LYNCH, et al.,

Respondents.

PETITION FOR WRIT OF MANDAMUS

No. 73-1002

JOSEPH C. VALENTINO,

Plaintiff-Appellant,

v.

MICHAEL J. HOWLETT, Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 72 C 2941
William J. Lynch, *Judge.*

ARGUED MAY 25, 1973 — DECIDED JUNE 8, 1973

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* Associate Justice Tom C. Clark, Supreme Court of the United States, Retired, is sitting by designation.

ORDER

Petitioner Joseph Valentino seeks a writ of mandamus directing the district court to order the convening of a three-judge court to hear and determine the constitutionality of a state statute restricting the issuance of a temporary driving permit in hardship cases where a driving license has been withdrawn pursuant to the Illinois Financial Responsibility Act, and to enjoin enforcement of the state statute. Petitioner's complaint, filed November 21, 1972, alleged that Ill. Rev. Stat., ch. 95 1/2, subchapters 6 and 7, unconstitutionally denies plaintiff and all others similarly situated equal protection of the laws in that it prevents them from obtaining restricted driving permits without complying with the security provisions of the Illinois Financial Responsibility law while permitting others whose licenses have been revoked for a variety of other reasons, including reckless homicide, to obtain hardship driving permits without any special requirements. The district judge denied petitioner's motion for a three-judge court, a motion for a preliminary injunction, and a motion to determine the propriety of a class action. The district court retained jurisdiction of the action, however, and ordered the defendant to file an answer within twenty days of its order.

An order denying a three-judge court is not in itself appealable. 9 Moore, Federal Practice ¶ 110.03 [3] at 74. Mandamus has been held to be the proper remedy and the court of appeal the proper forum in cases where the district judge does not dismiss the case yet refuses to convene a three-judge court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962); *Cancel v. Wyman*, 441 F.2d 553 (2d Cir. 1971); 9 Moore, supra, at 74.

The Supreme Court held in *Idlewild Bon Voyage Liquor Corp., supra*, 370 U.S. at 715, that "[w]hen an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." The Court reaffirmed this view recently in *Goosby v. Osser*, ... U.S. ....., 41 U.S.L.W. 4167 (Jan. 17, 1973), stating "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous" and that a "claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' " 41 U.S.L.W. at 4169.

Under these tests the question raised by the petitioner is clearly not wholly insubstantial. The Supreme Court in *Bell v. Burson*, 402 U.S. 535 (1971), held that drivers' licenses involve important interests and that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* at 539. The Court also stated that while the state possesses the power to bar the issuance of licenses to all motorists who do not carry liability insurance or who do not post security, it "does not follow . . . that the amendment also permits the . . . statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under the penalty of loss of the licenses." *Id.* See also *Perez v. Campbell*, 402 U.S. 637 (1971)

We conclude and mandate that the district judge notify the Chief Judge of this Circuit to designate two additional judges to constitute, with the district judge herein, a three-judge court to hear and decide the constitutional question raised by the petitioner. Petitioner filed a protective appeal from the denial of a preliminary injunction. The judgment in that case,

docketed as No. 73-1002 in this Court and argued with the petition for mandamus, will be vacated and remanded for further proceedings consistent with the views expressed in this opinion. The temporary injunction granted by this Court pending the petition for mandamus and the appeal will be continued until a three-judge court is convened. At that time that court can determine whether to issue a continuing injunction.

MANDAMUS ISSUED

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March 31, 1976

William Beltz, Executive Editor
Bureau of National Affairs, Inc.
1231 25th Street N.W.
Washington, D.C. 20037

Dear Mr. Beltz:

I am enclosing for your information a copy of a mandamus petition filed in the United States Supreme Court. The petition seeks relief from the Seventh Circuit Court of Appeals rule which regulates publication of rulings and prohibits citation of "unpublished orders", even where the court has provided written reasons within the text of the order.

Recently this rule and similar rules in other circuits have been subjected to criticism by members of the legal profession. Last October, the American Bar Association Journal published an article expressing concern over the similar Ninth Circuit rule.

It would seem that legal publishers would be among those parties interested in the outcome of any dispute concerning the right to publish and cite opinions. I would be most pleased to hear your thoughts concerning rules of this nature.

Very truly yours,

Theodore M. Becker

TMB/djb
enclosure

Supreme Court, U. S.
JUN 24 1976
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1404, ~~Misc.~~

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and each Circuit Judge in regular active service thereon,

Respondents.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

WILLIAM J. SCOTT,
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Respondent.

ROBERT G. EPSTEEN,
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Of Counsel.

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Oral Argument Requested

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IN THE

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THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and each Circuit Judge in regular active service thereon,

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BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

ISSUE PRESENTED FOR REVIEW

Whether the extraordinary relief of writs of mandamus and prohibition sought in this Honorable Court to compel the Honorable United States Court of Appeals for the Seventh Circuit to reconsider its denial of Petitioners' prior "petition for Writ of Mandamus" against the Honorable Joel M. Flaum, Judge of the United States District Court for the Northern District of Illinois and Michael J. Howlett, Secretary of State of Illinois, is appropriate?

PREFATORY STATEMENT

Respondent has been informed and believes that in the petition at bar the Solicitor General is representing the United States Court of Appeals for the Seventh Circuit and the Judges in service thereon and that the Solicitor General's response will directly address the issue of the constitutionality of Rule 28 of the United States Court of Appeals for the Seventh Circuit. This response filed on behalf of Michael J. Howlett, Secretary of State of Illinois is therefore limited to the question of whether petitioners should be granted the extraordinary relief which they seek in the instant case.

STATEMENT OF THE CASE

Do-Right Auto Sales is an Illinois Corporation located in Blue Island, Illinois. Timothy O'Brien was the sole incorporator and is the president of said corporation. As is required by Illinois Statute, Do-Right holds a Dealers Certificate of Authority (hereinafter certificate) issued by the respondent, Michael J. Howlett, Secretary of State of Illinois. This certificate entitles the holder to engage in the business of a dealer in automobile parts and rebuilt automobiles.[1]

On or about July 17, 1975, petitioners received an order of revocation from respondent stating that said certificate had been revoked on July 2, 1975. This order of revocation was erroneously issued through administrative error and was never intended to be an order of revocation, but rather a notice of hearing (see affidavit of Jay L. Mesi reproduced in Appendix p. a1. The original affidavit was filed as an attachment to Respondent's Answer in Seventh Circuit case number 76-1022).

---

1. There is currently some question as to whether Do-Right Auto Sales Corp. existed between July 1, 1974 and May 20, 1976. On December 21, 1974 said corporation was subjected to involuntary dissolution effective July 1, 1974 for failure to file an annual report and pay an annual franchise tax. However, in May, 1976 Do-Right Auto Sales Corp. applied for reinstatement and was reinstated on May 20, 1976. The above facts present the questions of whether the certificate involved lapsed and became null and void because the holder ceased to exist, and whether the pending proceedings concerning this certificate should be considered revocation proceedings or proceedings on an application for issuance of a new certificate. However, for purposes of this response it is assumed that the certificate holder is and was an existent corporation during the period in question and the certificate did not lapse and become null and void.

After receiving the above mentioned order, petitioners did not immediately request a hearing from respondent, but rather applied for and obtained a temporary restraining order from the Federal District Court on July 23, 1975 (Case No. 75 C 2421). The order enjoined respondent from revoking petitioners' certificate without a prior hearing and required petitioners to request such a hearing. At petitioners' request respondent scheduled a hearing and agreed not to revoke the certificate pending its outcome.

The hearing was commenced on August 21, 1975 and is still pending. After the first day of the hearing petitioners filed a motion in the Federal District Court requesting: 1) that the order which required them to request a hearing be vacated; and 2) a temporary restraining order enjoining respondent from revoking their certificate or holding to determine if their certificate should be revoked. On September 29, 1975, the Court vacated the order requiring them to request a hearing and denied their motion for a temporary restraining order. At the same time the Court ordered respondent to respond to petitioners' motion to convene a three-judge district court. After respondnt filed a memorandum in opposition to petitioners' motion for a three-judge district court, the District Court, on December 19, 1975, denied the motion.

On January 8, 1976, petitioners filed, as an original proceeding, a petition in the United States Court of Appeals for the Seventh Circuit (Case No. 76-1022), seeking a writ of mandamus directing the District Court to convene a three-judge court. In said petition the petitioners cited a number of authorities for their position, including an unpublished order in the case of *Valentino* v. *Lynch* (7th

Cir., Case No. 73-1089, June 8, 1973). Respondent filed a motion to strike reference to this unpublished order pursuant to Seventh Circuit Rule 28, and an answer as to the balance of the petition.

On February 2, 1976 the Seventh Circuit granted respondent's motion to strike and further denied the petition for a writ of mandamus. Subsequently petitioners filed the motion which is the subject of this response, seeking leave to file a petition for writs of mandamus and prohibition with this Honorable Court.

ARGUMENT

I.

THE ISSUE OF THE VALIDITY OF SEVENTH CIRCUIT RULE 28 IS MOOT.

It is a well established rule that this Honorable Court does not issue advisory opinions, and that the controversy must be extant at all stages of review. *Preiser* v. *Newkirk*, 422 U.S. 395, 45 L. Ed. 2d 272 (1975); *De Funis* v. *Odegaard*, 416 U.S. 312, 40 L. Ed. 2d 164 (1974). Petitioners attempted to cite an unpublished order in *Valentino* v. *Lynch* (7th Cir. No. 73-1089, June 8, 1973) for the purpose of showing that mandamus is a proper procedure to compel the convening of a three-judge court. While it is submitted that a three-judge court is not required to hear petitioners' claim, if petitioners desire to cite this case they may cite the *published opinion* in the same case which is reported as *Valentino* v. *Howlett*, 528 F. 2d 975 (7th Cir. 1976).

Respondent has not contested the propriety of the procedure of mandamus, but only that in the instant case the use of this extraordinary remedy is inappropriate. It is submitted that neither the unpublished order nor the published opinion in *Valentino* provide authority to substantiate petitioners' request in the Seventh Circuit for a writ of mandamus compelling the convening of a three-judge court. However, if petitioners desire to cite this case they may cite the published opinion. Since everything of substance contained in the unpublished order is also contained in a published opinion, petitioners no longer have a need to cite the unpublished order. Therefore the issue of the validity of Seventh Circuit Rule 28 has been rendered moot, and petitioners' request for an extraordinary writ declaring it unconstitutional should be denied.

II.

PETITIONERS HAVE NO RIGHT TO A THREE-JUDGE COURT, WHICH IS WHAT THEY ARE SEEKING.

The relief sought by petitioners is an extraordinary remedy reserved for really extraordinary causes. *Will* v. *United States,* 389 U.S. 90, 107, 19 L. Ed. 2d 305, 317 (1967). Only exceptional circumstances will justify its invocation and petitioners have the burden of showing that their right to such a writ is clear and undisputable. *Id.* at 389 U.S. 95-96, 19 L. Ed. 2d 310. Petitioners are seeking in essence a double mandamus directing the convening of a three-judge court (a writ from this Court directing the 7th Circuit to reconsider its denial of a writ against the District Court). It is submitted that before petitioners have a right to this extraordinary writ, they have a burden of showing not only that they have a clear and undisputed right to cite an unpublished order, but they also have the burden of showing that if they are permitted to cite this unpublished order they can establish a clear and undisputed right to have a three-judge district court convened. Petitioners have unquestionably failed to meet their required burden.

It is well established that the purpose of convening a three-judge district court under 28 U.S. C.A. § 2281 is to provide procedural protection against an improvident invalidation of a state's legislative policy by a single federal judge. *Phillips* v. *United States,* 312 U.S. 246, 85 L. Ed. 800 (1941); *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 42 L. Ed. 2d 249 (1974). Section 2281 does not contain a policy which liberally allows requests for the convening of three-judge courts, but is to be construed as a provision which is technical in the strict sense of the term and is to be applied as such. *Phillips* v. *United States, supra; Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 40 L. Ed. 2d 452 (1974).

In *ex parte Poresky,* 290 U.S. 30, 78 L. Ed. 152 (1933) the court held that before a three-judge court may be convened, there must be a substantial claim of unconstitutionality. The Court in discussing what constituted a substantial claim of unconstitutionality stated:

> "The question may be plainly unsubstantial, either because it is "obviously with out merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Id.* at 290 U.S. 32, 78 L. Ed. 153.

Although primarily directed to the standard of foreclosed by previous decisions, the Court affirmed this two pronged test in *Goosby* v. *Osser,* 409 U.S. 512, 35 L. Ed. 2d 36 (1973), and claims have been held unsubstantial which have not been foreclosed. *Sheehan* v. *Scott,* 520 F. 2d 825 (7th Cir. 1975).

In their petition filed in Seventh Circuit case number 76-1022 petitioner claimed that Ill. Rev. Stat. Ch. 95½, §§ 5-501(a)(5) and (a)(6) violated the Fourteenth Amendment to the United States Constitution in that it provided for the revocation of a certificate prior to a hearing. Not only do these challenged statutes not provide for revocation without a hearing, but in the instant case respondent intended to issue a notice of hearing to petitioners. However, due to administrative error an order of revocation rather than a notice of hearing was issued (see Affidavit of Jay L. Messi, Appendix p. a1). After receiving this notice, petitioners applied to the Federal District Court for a temporary restraining order on the basis that the revocation without a prior hearing violated the due

process clause of the Fourteenth Amendment to the United States Constitution. The Court granted the temporary restraining order and further ordered petitioners to request a hearing from respondent. Petitioners requested the hearing and respondent, since he never intended to revoke the certificate prior to a finding at a hearing, immediately scheduled a hearing and agreed not to revoke the certificate pending its outcome.

Even though petitioners have been afforded the hearing which they sought, they are now seeking to enjoin that very proceeding which they claimed was necessary to protect their constitutional rights.

Ill. Rev. Stat., Ch. 95½, §§ 5-501(a)(5) and (a)(6) do not provide the procedure, but rather the basis for revocation or suspension of a certificate. They do not deal with *how* a certificate is revoked or suspended, but rather *why* it may be revoked or suspended. These provisions simply set forth certain grounds or reasons for revocation or suspension of certificates. They, as well as the other subsections of § 5-501, give notice to holders of certificates and state officials as to what is required, what is prohibited, and what is the basis for a suspension or revocation of a certificate. Section 5-501 does not in any way provide for the procedure used to suspend or revoke certificates. Assuming *arguendo* that the procedure of revocation was unconstitutional, it would still not affect the constitutionality of the criteria for revocation set forth in § 5-501. Since in the instant action petitioners' only allegation of a substantial constitutional question which requires a three-judge court is not the basis for revocation, but is limited to the necessity of a prior hearing, they are not attacking the constitutionality of § 5-501, but rather the procedure by which it is implemented.

A three-judge court is not required to hear a claim that a constitutional statute is administered in an unconstitutional manner. *Butler* v. *Dexter*, —— U.S. ——, 47 L. Ed. 2d 774 (1976); *Santiago* v. *Corporation De Renovacion Urbana y Vivienda De Puerto Rico*, 453 F. 2d 794 (1st Cir. 1972). With the exception of the administrative error which was quickly rectified, section 5-501 has not been administered in any way which conflicts with the due process clause. However, even if there was a question regarding the administration of this section, it would not require a three-judge court.

Petitioners' contention that there must *always* be a prior hearing before a right or interest such as a certificate or license may be revoked is clearly erroneous, and their citation of *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970); *Bell* v. *Burson*, 402 U.S. 535, 29 L. Ed. 2d 90 (1971); and their progeny is misplaced. While it is not contended that respondent may in the instant case revoke petitioners' certificate without a prior hearing, it is clear that the above mentioned cases do not hold that the state must always grant a hearing prior to revoking or suspending a license or certificate.

In *Goldberg* v. *Kelly, supra,* the Court held that a welfare recipient was entitled to a hearing prior to termination of welfare benefits. This opinion is based on the Court's determination that the recipient had a "brutal need" and, therefore, his interest in avoiding the loss of benefits outweighed the governmental interest in summary adjudication (the only governmental interest advanced was the need to preserve public funds). However, the Court also stated:

> It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. *Id.* at 397 U.S. 363, 25 L. Ed. 2d 296.

In a footnote (footnote number 10) to the above quotation, the Court recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, a governmental body can revoke or suspend a right prior to a hearing which is to be held at a later date. (This footnote also contains examples of instances where summary action pending a later hearing is appropriate.) In *Bell* v. *Burson, supra,* the Court stated that due process does not require a prior hearing in emergency situations. In *Goss* v. *Lopez,* 419 U.S. 565, 582, 583, 42 L. Ed. 2d 725, 739 (1975) the Court stated:

> . . . there are recurring situations in which prior notice and hearing cannot be insisted upon . . . In such cases, the necessary notice and . . . hearing should follow as soon as practicable . . .
>
> • • •

[Also see *Torriente* v. *Stackler,* 529 F. 2d 498, 502 (7th Cir. 1976); *Hubel* v. *West Virginia Racing Commission,* 513 F. 2d 240, 243-244 (4th Cir. 1975)]

Whether due process requires that a hearing be held prior to revocation depends on the particular facts and interests involved in such case. It would be impossible to provide for every conceivable situation in the statute. As the Court stated in *Goss* v. *Lopez, supra:*

> . . . the interpretation and application of the Due Process Clause are intensely practical matters and that "*[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.*" Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961). *Id.* at 419 U.S. 578, 42 L. Ed. 2d 737 (emphasis added).

From the above it is clear that petitioners' claim that due process requires the statute to grant in every instance a hearing prior to revocation or suspension has been foreclosed by prior decisions of the Supreme Court. What the due process clause does require in every instance is notice and an opportunity to be heard. This is guaranteed to petitioners by Ill. Rev. Stat. (1975) Ch. 95½, § 2-118. It should be noted that subsection (d) of this Section specifically provides:

> All hearings and hearing procedures shall comply with requirements of the Constitution, so that no person is deprived of due process of law . . .

Therefore, if the facts are such that due process requires a prior hearing, Ch. 95½, § 2-118(d) requires that the opportunity for a hearing prior to revocation of suspension be afforded.

For the above stated reasons, petitioners' claim that the statutes in question violate the Fourteenth Amendment is obviously without merit and is foreclosed by prior decisions of this Court. Therefore it is unsubstantial and does not require the convening of a three-judge district court. Since it is clear that a three-judge district court is not required in the case at bar it is respectfully submitted that it would be inappropriate to issue a writ of mandamus compelling the Seventh Circuit to reconsider its denial of a writ of mandamus directing the convening of such a court.

III.

THE EXTRAORDINARY WRIT SOUGHT IS INAPPROPRIATE IN THE INSTANT CASE.

As previously mentioned, the relief which is sought by petitioners is a truly extraordinary writ which is re-

served for really extraordinary causes; only exceptional circumstances will justify its invocation, and petitioners have the burden of showing that their right to such a writ is clear and indisputable. *Will* v. *United States,* 389 U.S. 90, 19 L. Ed. 2d 305 (1967) U.S. Supreme Court Rule 30. In support of their petition for mandamus in the Seventh Circuit, petitioners cited three opinions and an unpublished order. These cases are inapposite and not controlling in the action at bar.

In *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 8 L. Ed. 2d 794 (1962) a request for a three-judge court was denied. The single judge retained jurisdiction but, in effect, abstained "in order to give the state courts an opportunity to pass upon the constitutional issue presented, although there was no relevant litigation then pending in the state courts." *Id.* at 370 U.S. 714, 8 L. Ed. 2d 796. The Court pointed out that the Circuit Court of Appeals had held that a three-judge district court should have been convened and the District Court interpreted their language as merely dictum and had once again refused to convene a three-judge court. *No writ of mandamus was issued,* but the Supreme Court simply remanded to the District Court. It should be noted that in *Idlewild* the petitioner was effectively out of Court and that in the case at bar the petitioners are proceeding with their hearing and are not out of court. The District Judge has not abstained and is probably awaiting this Court's decision before ruling on the pending motion to dismiss. If he does dismiss then petitioners may raise the three judge court question on appeal. It should also be noted that in *MTM* v. *Baxley,* 420 U.S. 799, 43 L. Ed. 636 (1975) Mr. Justice White in his concurring opinion stated:

> Cases like Idlewild are derelicts and should be expressly cleared from the scene. *Id.* at 420 U.S. 807, 43 L. Ed. 2d 642

In *Cancel* v. *Wyman,* 441 F. 2d 553 (2d Cir. 1971) the Court held that mandamus was a proper remedy and still

they denied the writ, noting that the denial would not prejudice petitioners since if they were to win before the single judge on the non constitutional issues, a three- judge court would be unnecessary, and, if they were to lose they could still raise the denial of a three-judge court on appeal. The Court stated that by denying the writ they conserved judicial resources and at the same time afforded an opportnity for adequate review of a denial of a motion to convene a three-judge court.

Svejkovsky v. *Tamm,* 326 F. 2d 657 (D.C. Cir. 1963) involved a case where both plaintiff and defendant agreed that a three-judge court was necessary. However, the single judge entered a stay pending a decision of this Court in a similar case. The Circuit Court held that the stay was improperly entered by a single judge and he should have proceeded to convene the three-judge court. *However, once again no writ of mandamus was issued.*

The unpublished order which petitioners attempted to cite is also inapposite and not controlling in the instant action. That case involved a claim that a statute on its face created an arbitrary and invidious classification. The instant action involves a claim that a statute is *applied* unconstitutionally.

In all the published opinions cited by petitioners *no writ of mandamus was issued.* The only case cited by petitioners where a writ was issued was in the *Valentino* unpublished order.[2] The fact that petitioners have had so much trouble citing authorities where a writ was actually issued illustrates the fact that a writ of mandamus is reserved for really extraordinary circumstances.

---

2. In the *Valentino* v. *Howlett* opinion, supra (not cited by petitioners) the court refered to a writ of mandamus having been issued.

As previously discussed, petitioners have not presented a claim which requires a three-judge court. It is also respectfully submitted that the current trend of this Court has been to limit the use of the three-judge courts and the types of cases which require them to be convened is rapidly contracting. A single judge may now dismiss for lack of standing. *Gonzalez* v. *Automatic Employees Credit Union, supra.* Mr. Justice White in a concurring opinion in *MTM* v. *Baxley, supra,* stated that *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 8 L. Ed. 2d 794 (1962) should be overruled and a single judge should be permitted to abstain.

This trend alone should prevent the issuance of the writ in all but the most flagrant instances of a single judge's abuse of discretion.

In the instant action it is clear that a three-judge court is not necessary, and obviously a writ of mandamus directing the Seventh Circuit to reconsider its denial of their first petition for mandamus is inappropriate. The fact that petitioners had such difficulty citing authority where the type of writ sought was actually issued indicates how rare the instances are when its use is proper. Petitioners have clearly failed to meet their required burden and the writ should be denied. This denial will not prejudice petitioners and will conserve judicial resources.

CONCLUSION

For the above stated reasons respondent, Michael J. Howlett, respectfully urges this Honorable Court to deny petitioners motion for leave to file their petition or in the alternative to deny the petition for writs of mandamus and prohibition.

Respectfully submitted.

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160 North LaSalle Street, Suite 900,
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Respondent.

ROBERT G. EPSTEEN,
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Of Counsel.

APPENDIX

APPENDIX

AFFIDAVIT

I, Jay L. Mesi, employed by the Office of the Secretary of State, do hereby affirm and attest that in July, 1975, I was working in the Vehicle Services Department and caused an Order of Revocation to be sent out to Do-Rite Auto Sales.

I hereby state that the above Order of Revocation was issued by administrative error and as such was never intended to be an Order of Revocation but rather a Notice of Hearing.

It is also the position of the Office of the Secretary of State that the word "finds" in Section 5-501(a) of the Illinois Vehicle Code is interpreted as affording an administrative hearing prior to a suspension of revocation of a dealers license.

Jay L. Mesi /s/

Subscribed and sworn to before me this 23rd day of January, A.D., 1976.

Patricia L. VanCamp, /s/

Notary Public.

Ill. Rev. Stat. (1975), Ch. 95½, § 2-118:

2-118. § 2-118. **Hearings.** (a) Upon the suspension, revocation or denial of the issuance of a license, permit or registration or certificate of title under this Act of any person the Secretary of State shall immediately notify such person in writing and upon his written request shall, within 20 days after receipt thereof, set a date for hearing and afford him an opportunity for a hearing as early as practical, in either the County of Sangamon or the County of Cook as such person may specify, unless both parties agree that such hearing may be held in some other county.

(b) At any time after the suspension, revocation or denial of a license, permit or registration or certificate of title of any person as hereinbefore referred to, the Secretary of State, in his discretion and without the necessity of a request by such person, may hold such a hearing, upon not less than 10 days' notice in writing, in the Counties of Sangamon or Cook or in any other county agreed to by the parties.

(c) Upon any such hearing, the Secretary of State, or his authorized agent may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books and records and may require an examination of such person. Upon any such hearing, the Secretary of State shall either rescind or, good cause appearing therefor, continue, change or extend the Order of Revocation or Suspension, as the case may be.

(d) All hearings and hearing procedures shall comply with requirements of the Constitution, so that no person is deprived of due process of law nor denied equal protection of the laws. All hearings shall be held before the Secretary of State or before such persons

as may be designated by the Secretary of State and appropriate records of such hearings shall be kept. Where a transcript of the hearing is taken, the person requesting the hearing shall have the opportunity to order a copy thereof at his own expense.

(e) The action of the Secretary of State in suspending, revoking or denying any registration, license or permit or certificate of title shall be subject to judicial review in the Circuit Court of Sangamon County or in the Circuit Court of Cook County and the provisions of the "Administrative Review Act", approved May 8, 1945, and all amendments and modifications thereto, and the rules adopted pursuant thereto, are hereby adopted and shall apply to and govern every action for the judicial review of final acts or decisions of the Secretary of State hereunder.

Ill. Rev. Stat. (1975), Ch. 95½, § 5-501(a)(1)-(a)(6):

Denial, suspension or revocation of a license. (a) The license of a person issued under this Chapter may be denied, revoked or suspended if the Secretary of State finds that the licensee, or any officer, director, partner, manager or member of the licensee has:

1. Violated this Act;

2. Made any material misrepresentation to the Secretary of State in connection with an application for a license, junking certificate, salvage certificate, title or registration;

3. Been guilty of a fraudulent act in connection with selling, bartering, exchanging, offering for sale or otherwise dealing in vehicles, bodies and component parts;

4. As a new vehicle dealer has no contract with a manufacturer or enfranchised distributor to sell that new vehicle in this State;

5. Not maintained an established place of business as defined in this Chapter;

6. Failed to file or produce for the Secretary of State any application, report, document or other pertinent books, records, documents, letters, contracts, required to be filed or produced under this Chapter or any rule or regulation made by the Secretary of State pursuant to this Chapter;

Supreme Court, U. S.
FILED
AUG 30 1976
MICHAEL RODAK, JR., CLERK

No. 75-1404

ne Court of the United States

OCTOBER TERM, 1975

ALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN,
T AUTO SALES, INDIVIDUALLY AND ON
HERS SIMILARLY SITUATED, PETITIONERS

v.

STATES COURT OF APPEALS FOR THE
AND EACH CIRCUIT JUDGE IN REGULAR
ERVICE THEREON, RESPONDENTS

---

*OR LEAVE TO FILE A PETITION FOR
MANDAMUS AND PROHIBITION*

**ON FOR RESPONDENTS THE UNITED STATES
S FOR THE SEVENTH CIRCUIT AND EACH
N REGULAR ACTIVE SERVICE THEREON**

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1404

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, D/B/A DO-RIGHT AUTO SALES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND EACH CIRCUIT JUDGE IN REGULAR ACTIVE SERVICE THEREON, RESPONDENTS

ON MOTION FOR LEAVE TO FILE A PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

BRIEF IN OPPOSITION FOR RESPONDENTS THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND EACH CIRCUIT JUDGE IN REGULAR ACTIVE SERVICE THEREON

JURISDICTION

On February 2, 1976, the court of appeals entered an order without opinion (Pet. App. 1a) denying petitioners' petition for a writ of mandamus directing a district judge to convene a three-judge court to hear their suit challenging the validity of a state statute. The motion here for leave to file a petition for writs of mandamus and prohibition and the accompanying petition were filed on April 5, 1976. Petitioners invoke this Court's jurisdiction under the all-writs statute, 28 U.S.C. 1651. We think they are mistaken. The cases they cite (Pet. 12) in support of such

jurisdiction—*Ex Parte Northern Pac. R. Co.*, 280 U.S. 142 (1929), and *Ex Parte Cogdell*, 342 U.S. 163 (1951)—are wide of the mark. Those cases involved *dismissals* by a single judge of actions challenging, respectively, the constitutionality of a railroad rate order of a state board and an act of Congress, as against contentions that three-judge courts were required. This Court has exclusive appellate jurisdiction to review decisions in actions "required . . . to be heard and determined by a district court of three tioners cite, this Court deemed it to be appropriate, "in aid of" (28 U.S.C. 1651) that jurisdiction, to entertain original petitions for writs of mandamus directing the convening of three-judge courts. Here, on the other hand, petitioners challenge the action of the court of appeals in denying their petition for a writ of mandamus directing the district judge to convene a three-judge court to hear their *pending* action. This Court's jurisdiction to review "[c]ases in the courts of appeals" is "[b]y writ of certiorari". 28 U.S.C. 1254(1). See *Will* v. *United States*, 389 U.S. 90 (1967); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

RULE AND STATUTE INVOLVED

The Seventh Circuit's Rule 28, effective February 1, 1973, is quoted in full in petitioners' petition for writs of mandamus and prohibition, pp. 2-4. Relevant amendments in the court's revised rule, effective July 1, 1976, and numbered 35, are noted in the course of our argument. The revised rule is set forth in full in the Appendix, *infra*, pp. 12a-15a.

At the time of the proceedings below 28 U.S.C. 2281 provided:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer

judges." 28 U.S.C. 1253. Accordingly, in the cases peti-

> of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Section 2281 was repealed by Public Law 94-381, August 12, 1976, 90 Stat. 1119, with the proviso that the repeal "shall not apply to any action commenced on or before the date of enactment."

QUESTIONS PRESENTED

1. Whether petitioners made the required showing below of a substantial and live issue concerning the constitutionality of the Illinois statute they had challenged in their underlying suit so as to require the convening of a three-judge district court to hear the suit.

2. Whether the Seventh Circuit's rule barring a litigant from citing an earlier unpublished decision of the court as a supporting precedent, a rule which is an integral part of a larger plan not to publish decisions which have no precedential value but only those having such value, is a valid exercise of the court's authority to regulate the practice before it.

STATEMENT

The brief in opposition filed on behalf of respondent Howlett contains (pp. 4-6) a complete and undisputed[1] statement of the facts involved and the proceedings below. References to that statement are made in the course of our argument.

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[1]See Petitioners' Memorandum in Reply to Michael J. Howlett's Brief in Opposition.

SUMMARY OF ARGUMENT

1. The issue petitioners raised in their underlying suit as to the constitutionality of an Illinois statute on the ground that, on its face, it permitted respondent Howlett to revoke their license without a prior hearing, and petitioners' concomitant claim of right to a three-judge court, based upon a 1973 Seventh Circuit unpublished decision mandating the convening of a three-judge court, a decision which the court's rule barred them from citing as a precedent in support of their petition below for a writ of mandamus directing the district judge to convene a three-judge court, had become moot as a result of the action of Howlett, in the course of the proceedings in the underlying suit, in according petitioners the prior hearing they claimed was their right. In addition, the unpublished decision is inapposite. Consequently, it is idle for petitioners to ask this court to mandate the court of appeals to repeal its non-citation rule and to reconsider, "in light of" the unpublished decision, its order denying their petition for a writ of mandamus.

2. The rule barring the citation of an unpublished decision as a precedent is an integral, logical and necessary part of a larger opinion publication plan designed to relieve the burden upon judges of writing for publication in cases in which the decision has no precedential value so that they may have adequate time and energy to devote to writing for publication in cases in which the decision should be incorporated into the body of precedent. As a result of the initiative of the Judicial Conference of the United States, such plans are now in operation in all of the courts of appeals. Basically, the plans call for publication only when the court determines that its disposition of a case has value as a precedent. A substantial majority of the circuits deem the non-citation rule to be a logical and necessary part of such plans. The plans are experimental.

The Conference encourages such experimentation with a view to arriving at a common plan.

Petitioners attack upon the non-citation rule is grounded in the judicially-created policy of *stare—decisis*. By definition, a court has authority to determine whether a given decision has value as a precedent and should therefore be published as part of the body of precedent. If a decision does not have such value, publication would serve no useful purpose and, by the same token, it would serve no useful purpose to permit it to be cited.

ARGUMENT

The brief in opposition filed on behalf of respondent Howlett, Secretary of State of Illinois,[2] exposes the syllogism whereby petitioners would have this Court, in the exercise of its sound discretion, issue its writ to the Seventh Circuit directing that court to reconsider its denial, in the exercise of its discretion, of petitioners' petition for a writ of mandamus directing a judge of the District Court for the Northern District of Illinois to order the convening of a three-judge district court to hear petitioners' pending suit challenging the validity of an Illinois statute which, they say, "permits revocation of licenses without prior hearings" (Pet. 5). The short of the matter is that petitioners would have this Court intercede by extraordinary writ and, in effect, direct the Seventh Circuit to decide the three-judge court question in their favor.[3]

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[2]Petitioners did not name Howlett as a respondent in this Court. He is a respondent by virtue of this Court's Rule 31(3).

[3]This Court's Rule 30 provides: "The issuance by the court of any writ authorized by 28 U.S.C. §1651(a) is not a matter of right but of sound discretion sparingly exercised." Treating the petition as a petition for a writ of certiorari, petitioners' case stands no better. "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor . . . ." Rule 19(1).

I

PETITIONERS FAILED TO MAKE A SHOWING OF A SUBSTANTIAL AND LIVE ISSUE CONCERNING THE CONSTITUTIONALITY OF THE ILLINOIS STATUTE. ACCORDINGLY, THE COURTS BELOW CORRECTLY DENIED THEIR PLEAS FOR A THREE-JUDGE DISTRICT COURT

The springboard of petitioners' case for the extraordinary relief they seek is the Seventh Circuit's June 1973 unpublished memorandum order in *Valentino* v. *Hon. William J. Lynch* (Pet. App. 3a-6a), a mandamus proceeding to compel a district judge to convene a three-judge court to hear Valentino's suit attacking "the constitutionality of a state statute restricting the issuance of a temporary driving permit in hardship cases where a driving license has been withdrawn pursuant to the Illinois Financial Responsibility Act. . . . [Valentino's] complaint. . . alleged that [the statute] unconstitutionally denies plaintiff and all others similarly situated equal protection of the laws in that it prevents them from obtaining restricted driving permits without complying with the security provisions of the Illinois Financial Responsibility law while permitting others whose licenses have been revoked for a variety of other reasons, including reckless homicide, to obtain hardship driving permits without any special requirements" (Pet. App. 4a). The court held that while an order denying a three-judge court is not itself appealable, mandamus is "the proper remedy and the court of appeals the proper forum" where, as here, a district judge refuses to convene a three-judge court in a case still pending before him[4] and that

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[4]Respondent Howlett points out (Br. in Opp. 14) that petitioners' underlying action is pending before the district judge on Howlett's motion to dismiss and that if the judge does dismiss, petitioners can raise the three-judge court question on appeal.

Valentino's allegation that the Illinois law denied him equal protection of the laws was "not wholly insubstantial" (Pet. App. 4a-5a). Accordingly, the court mandated the district judge to convene a three-judge court.

Following the "Guidelines for Method of Disposition" by published opinion or unpublished order set forth in the Seventh Circuit's then current Rule 28, effective February 1, 1973 (Pet. 2-4), the court decided that Valentino's petition for a writ of mandamus should be disposed of by an unpublished order containing the reasons for the court's action, in accordance with the guideline for such a disposition "in appeals which (a) are not frivolous but (b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance." Conversely, following the guidelines for disposition by a published opinion, the court decided that its disposition did not "(1) Establish a new or change an existing rule of law; (2) Involve an issue of continuing public interest; (3) Criticize or question existing law; or (4) Constitute a significant and non-duplicative contribution to legal literature (a) by a historical review of law; (b) by describing legislative history; or (c) by resolving or creating a conflict in the law."[5] In short, the *Valentino* court decided that its disposition had no precedential value and, as the Second Circuit put it in *United States* v. *Joly*, 493 F. 2d 672, 675 (1974), served no "jurisprudential purpose," and should therefore not be published.

The result of the court's action in this regard was that litigants are precluded by Rule 28 from citing the *Valentino*

[5]By amendment effective July 1, 1976, the Seventh Circuit added to these categories of cases to be disposed of by published opinions "appeals which . . . (v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order." The amended rule is numbered 35.

disposition "as precedent (a) to any federal court within the circuit in any written document or in oral argument . . . for any purposes except to support a claim of *res judicata*, collateral estoppel or law of the case." Equally, the rule bars the citation of *Valentino* as a precedent "(b) by any such court," except for the stated purposes.

This brings us to the second step in petitioners' case for extraordinary relief. They "sought to rely upon *Valentino* v. *Lynch*" in the court below (Pet. 8) to support their claim that they were entitled under the then current 28 U.S.C. 2281 to a three-judge court to hear their suit challenging the validity of the Illinois law pursuant to which, they say, their certificate of authority to engage in the business of dealing in automobile parts and rebuilt automobiles was revoked by respondent Howlett "without prior hearing" (Pet. 5). They argue that *Valentino* is "a ruling 'on all fours' with the instant case and, but for its unpublished status, a ruling which would be binding precedent upon the District Court" (Pet. 8) and, presumably, upon the Seventh Circuit as well, on the three-judge court question. And so they ask this Court to mandate the Seventh Circuit to repeal and cease enforcing Rule 28, to vacate its order striking their reference to *Valentino* and denying their petition for mandamus, and to reconsider their petition "in light of *Valentino* v. *Lynch*" (Pet. 13), all to the end, as petitioners see it, that the court will be bound, presumably by the doctrine of *stare decisis,* to issue its writ directing the district judge to convene a three-judge court.

We deem it to be appropriate at this point to inform the Court that the Seventh Circuit's revised Rule 35 (see fn. 5, p. 6, *supra*) added a provision reflecting a policy of the court which had evolved in the administration of Rule 28 since its promulgation in 1973 whereby "[a]ny person may request by motion that a decision by un-

published order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule."[6] The implications of this provision are plain, especially in the context of petitioners' plea here for the highly discretionary relief they seek. A litigant in a court within the circuit who finds himself in a predicament such as petitioners purportedly found themselves may ask the court of appeals to lift the restriction against citation of an unpublished order upon which he seeks to rely.

In any event, Rule 28 (now Rule 35) aside, there are several fatal flaws in petitioners' line of reasoning. In the first place, *Valentino* aside, their underlying suit challenged the constitutionality of the Illinois statute on the ground that it "permits revocation of licenses without prior hearings" (Pet. 5). Respondent Howlett points out in his brief in opposition (pp. 10, 12) that the challenged section (Ill. Rev. Stat. (1975), Ch. 95½, §5-501(a)(1)-(6))[7] provides that the Secretary of State "may" revoke a license if he "finds" that the licensee has engaged in specified proscribed conduct and that the procedure for revocation is prescribed in Ill. Rev. Stat. (1975), Ch. 95½, §2-118, entitled "Hearings". Section 2-118 provides that upon revocation of a license the Secretary shall immediately notify the licensee and, "upon his written request shall, within 20 days after receipt thereof, set a date for hearing."

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[6]In an article entitled *The Seventh Circuit Plan For Publication Of Opinions—A Continuing Experiment*, 51 Ind. L.J. 367, 371-372 (1976), Senior Seventh Circuit Judge Hastings said that this provision, which was under consideration at the time he wrote, "merely codifies our present practice" and that "[a] number of such [previously unpublished] decisions have been published, usually based upon requests by either or all of the parties to the proceeding."

[7]The provisions in questions are copied in the appendix to respondent Howlett's brief in opposition, pp. A2-A4.

This section also provides that hearings and hearing procedures shall comply with the due process and equal protection provisions of the Constitution and that the action of the Secretary in revoking a license "shall be subject to judicial review" in a state court in accordance with the Illinois Administrative Review Act. Respondent Howlett also points out that an order of revocation was sent to petitioners by mistake and that what was intended was a notice of hearing (Br. in Opp. 4-5).

In any event, as respondent Howlett points out in his undisputed statement of the proceedings below (Br. in Opp. 4-5), petitioners did not see fit to follow the procedures prescribed by Illinois law and instead filed their suit based upon the naked proposition that the law "permits" revocation of a license without a prior hearing. The district court restrained respondent Howlett from revoking petitioners' license without a prior hearing and directed petitioners to request a hearing, as provided in Section 2-118, *supra*. Petitioners did so, respondent Howlett scheduled a hearing and agreed not to revoke the license pending the hearing, and the hearing commenced. Not content with this course of events, petitioners, apparently as an afterthought, moved the district court to vacate its order directing them to request a hearing and for an order restraining respondent Howlett from revoking their license and from holding the very prior hearing which they insisted in the first place was a prerequisite of due process. The district court vacated its direction that petitioners request a hearing and denied the requested injunction. This was followed by the district court's denial of petitioners' motion to convene a three-judge court and the mandamus proceeding in the court below. As a result, both the administrative proceeding and the underlying suit are still pending.

In these circumstances, it is clear that when the three-judge court question was brought before the court below on petitioners' petition for a writ of mandamus there remained no issue, and certainly no substantial issue, as to the validity, as a matter of procedural due process, of the course of the proceedings before respondent Howlett to determine whether petitioners' license should be revoked. Petitioners were accorded the prior hearing they claimed they were entitled to under the due process clause. They themselves aborted the proceeding by their dilatory tactics in the district court. That court and the court below rightly perceived that the constitutional question raised initially in petitioners' complaint had disappeared from the case. And so petitioners were left where they started, with their naked assertion, as they put it, that the Illinois law "permits revocation of licenses without prior hearings" (Pet. 5). Perhaps it does, on its face.[8] But whether it does or does not, and whether it is administered consistently with the due process clause had become academic questions in this case. Courts, including, of course, three-judge courts, do not sit to decide such questions, but only genuine cases and controversies.

Secondly, again *Valentino* aside, insofar as petitioners' complaint encompassed a claim that the original revocation of their license without a prior hearing was an unconstitutional act in the administration of the Illinois law, their case for a three-judge court stands no better. As respondent Howlett points out (Br. in Opp. 11), "A three-judge court is not required to hear a claim that a constitutional statute is administered in an unconstitutional manner. *Butler* v. *Dexter,* U.S. , 47 L. Ed. 2d 774 (1976);

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[8]Petitioners concede here that their "attack" is upon the Illinois "statute on its face." Petitioners' Memorandum in Reply to Michael J. Howlett's Brief in Opposition, p. 3, fn. 1.

Santiago v. *Corporation De Renovacion Urbana y Vivienda De Puerto Rico,* 453 F. 2d 794 (1st Cir. 1972)."

Respondent Howlett also points (Br. in Opp. 11-12) to decisions of this Court holding that "some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing" (*Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1970); that ". . . there are recurring situations in which prior notice and hearing cannot be insisted upon . . . . In such cases, the necessary notice and . . . hearing should follow as soon as practicable . . ." *Goss* v. *Lopez,* 419 U.S. 565, 582 (1975).

We deem it to be unnecessary to explore the implications of these principles for this case, except to note that they point up the insubstantiality of the question petitioners sought to raise in their underlying suit concerning the constitutionality of the Illinois law on its face, and that, in any event, for the reasons stated above, any questions as to whether petitioners' interests in the benefit conferred upon them by the state are so great as to require a pre-termination hearing had been mooted as a result of their own actions.

Finally, petitioners' reliance upon *Valentino* is wholly misplaced. That case involved what the court regarded as a self-executing state law which was challenged as a denial of the substantive right to equal protection of the laws. Citing this Court's decision in *Bell* v. *Burson,* 402 U.S. 535 (1971), that "while the state possesses the power to bar the issuance of licenses to all motorists who do not carry liability insurance or who do not post security, it 'does not follow . . . that the [Fourteenth] amendment also permits the . . . statutory scheme where not all motorists, but rather only morists involved in accidents, are required to post security under the penalty of loss of the licenses,'" the

Valentino court concluded that Valentino's claim of denial of equal protection of the laws was "not wholly insubstantial" and that a three-judge court was therefore required (Pet. App. 5a).

Here, on the other hand, petitioners sought to call into question the validity of a state law on the ground that, on its face, it permitted the Secretary of State to revoke their license without a prior hearing. The law is obviously not self-executing. Whether it is administered in accordance with procedural due process requirements depends upon the actions of the Secretary in a given case. It bears repeating that the law requires the Secretary to comply with the due process and equal protection clauses of the Constitution. In this case, by mishap, the Secretary issued an order of revocation instead of a notice of hearing. The error was soon rectified when the Secretary, albeit as a result of petitioners' suit and the district court's restraining order, scheduled a hearing and agreed not to revoke petitioners' license pending its outcome. Petitioners thus received all that they sought. It was their own fault that the administrative proceeding was not carried through to a conclusion. We would add also that if the conclusion should go against them, they are entitled to judicial review in the Illinois courts.

In sum, putting aside the Seventh Circuit's rule barring the citation as precedent of a prior unpublished decision, the *Valentino* v. *Lynch* disposition furnished no support whatever for petitioners' pleas below for a three-judge court. They failed to meet their burden of showing that the constitutional question they sought to raise was not only a substantial one, but a live issue as well.[9]

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[9]It is interesting to note that in *Valentino* v. *Howlett*, 528 F. 2d 975 (1976), the Seventh Circuit affirmed the subsequent action of the three-judge court in dismissing the action as moot because

By the same token, we submit that it is idle for petitioners to ask this Court to mandate the Seventh Circuit to repeal and cease enforcing the rule so that they may again press *Valentino* upon that court as a binding precedent requiring it to mandate the district judge to convene a three-judge court.

Nevertheless, we will deal in the next point with petitioners' attack upon the validity of the rule.

II

THE RULE BARRING THE CITATION OF UNPUBLISHED DECISIONS IS AN INTEGRAL PART OF A LARGER PLAN TO DEAL WITH THE SEVERE PROBLEMS OF EVER-MOUNTING CASELOADS AND THE PROLIFERATION OF PUBLISHED OPINIONS AND IS A VALID EXERCISE OF THE AUTHORITY OF A COURT TO DETERMINE THE PRECEDENTIAL VALUE OF ITS DECISIONS

At the outset, we deem it to be important to set forth the history underlying the promulgation of the challenged rule. We begin with the report of the Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice in which it was said (p. 1):

> "Appellate judges have long been urging that many of their cases do not raise issues of types that, if discussed in depth, will contribute importantly to

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"Valentino's financial responsibility suspension [had] expired and his drivers license was restored" (*id.* 977). The court said that "The dispute between Valentino and the Department is mooted by the return of the drivers license to Valentino. There is no longer an adversary relationship between parties having a legally cognizable interest in the outcome of the case" (*id.* 979). So it is here; there is no longer "an adversary relationship" between petitioners and respondent Howlett concerning petitioners' right to a hearing to determine whether their license should be revoked.

knowledge of the law or its development. At the same time, many of these judges bemoan the lack of time to consider and develop the solution to significant problems in other cases . . . .

". . . The judges ranked opinion-writing as the second most significant cause of delay in the highest appellate courts . . . ."[10]

As a means of dealing with these problems the Committee recommended "that opinions be published only if certain defined standards for publication are satisfied" (*id.* 4) and it considered at length the standards to be applied, with the result that it recommended that no opinion should be published unless it satisfies one or more of the following guidelines: (1) "the opinion lays down a new rule of law, or alters or modifies an existing rule", (2) "the opinion involves a legal issue of continuing public interest", (3) "the opinion criticizes existing law", or (4) "the opinion resolves an apparent conflict of authority" (*id.* 15-17). The Committee thought that publication pursuant to these standards "provide[s] the stuff of the law: to permit an understanding of legal doctrine, and to accommodate legal doctrine to changing conditions" and that "the law can be better developed if judges writing opinions have adequate time and energy thoroughly to research and reflect upon the difficult cases which will result in published opinions" (*id.* 2-3).

Conversely, the Committee pointed out, there are many cases in which an opinion serves no other purpose than

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[10]The report was published under the title, *Standards for Publication of Judicial Opinions*, Federal Judicial Center Research Series No. 73-2, August 1973. The Council is a group of distinguished lawyers, law teachers and federal and state judges who were brought together by the Federal Judicial Center in September 1971 (*id.*, Preface).

to inform the parties of the decision and the court's reasoning (*id.* 2, 4) and that in such cases a disposition can "be short . . . need [not] cite all of the law and can deal mainly with facts as they relate to law". Accordingly, the Committee recommended the adoption of principles and procedures "that will reduce the publication of appellate opinions [in such cases] that are without general significance to the public, to the legal profession, or to advancing the functions of the law" (*id.* 5). Nonpublication in such cases, the Committee said, "can help redress the balance between what must be produced and assimilated and the resources available for production and assimilation" (*id.* 6).

Turning to the question whether it would be proper to allow the citation of an unpublished decision as a precedent, the Committee observed that "[a] court has power to determine what material can be cited to it as well as what material it will cite to support a proposition" (*id.* 18). It recognized that a plan to limit publication of opinions would not be effective without some control over the citation of unpublished decisions. The Committee opted (*id.* 20) for a non-citation rule as the best solution among the alternatives it considered for cases in which "judges can write opinions for the benefit of the parties without having to include all the factual background and detailed rationale that is required for opinions that will enter the body of precedential law" (*id.* 18). It cited the following as reasons for imposing a rule of non-citation (*id.* 19):

"1. It is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.

"2. Cost will be reduced by eliminating the need to obtain and examine the mass of opinions that are not designated for publication.

"3. The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication.

"4. Cost and delay of cases appealed only because they are apparently at odds with unpublished opinions, can be reduced.

"5. Great difficulty, if not impossibility, would be involved in determining whether an unpublished opinion has been overruled."

The Committee observed, however, that "[t]he non-citation rule does not preclude the use of reasoning and ideas taken from an unpublished opinion that may happen to be in the possession of counsel. The rule says simply that the opinions in certain cases do not have the status of precedents to influence future determinations" (*id.* 18-19). The Committee emphasized that the rule "relies on the correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other" (*id.* 21), in accordance with its recommended standards for publication.

The Committee appended to its report (*id.* 22-23) a Model Rule on Publication of Judicial Opinions which we set forth in the margin.[11]

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[11]1. Standard for Publication

An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:

a. The opinion establishes a new rule of law or alters or modifies an existing rule; or

b. The opinion involves a legal issue of continuing public interest; or

c. The opinion criticizes existing law; or

d. The opinion resolves an apparent conflict of authority.

(Continued)

The subject of "publication of opinions of the Courts of Appeals" was first broached in the Judicial Conference of the United States at its spring 1972 meeting when the Director of the Federal Judicial Center presented a recommendation on the matter on behalf of the Board of the Center. The Conference referred the recommendation to its Committee on Court Administration.[12]

At its fall 1972 meeting the Conference "approved the circulation to all circuit judges of the detailed recommendation of the Board of the Federal Judicial Center concerning the publication of opinions of the courts of appeals" and "requested each circuit to develop an opinion

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2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.

4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court.

[12]Report of the Proceedings of the Judicial Conference of the United States, April 6-7, 1972, p. 3).

publication plan by January 1, 1973," and submit it to the Committee on Court Administration.[13]

By the time of its spring 1974 session the Conference had received the reports it had called for at its previous meetings. In its report on that session the Conference said that these reports showed—

> "that during the 11 months ending November 30, 1973 a total of 4,563 cases was disposed of in the 11 circuits by published opinions, 1,478 by unpublished opinions and 2,408 without opinion. The Conference was advised that these figures indicate that each circuit in its own way has definitely embraced the concept of eliminating publication and circulation of circuit court opinions. While the plans of each circuit generally follow the basic recommendations of the report of the Federal Judicial Center to the April 1972 meeting of the Judicial Conference, each circuit, to a limited extent, is experimenting with respect to some phases of its plan. There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans. The Conference noted the view of its Committee and its Sub-committee that further experimentation may well lead to the amendment of the diverse

[13]Report of the Proceedings of the Judicial Conference of the United States, October 26-27, 1972, p. 33.

In the spring of 1973 the Conference extended to December 31, 1973, the time for the submission of plans, together with "statistics of the experience of the circuit in its opinion publication plan". Report of the Proceedings of the Judicial Conference of the United States, April 4-5, 1973, p. 5.

> circuit plans and that eventually a somewhat more or less common plan might evolve." Report of the Proceedings of the Judicial Conference of the United States, March 7-8, 1974, p. 12.[14]

The Conference further agreed that "each circuit should file with the Administrative Office on January 1 of each year a copy of its current publication plan, together with a narrative report on the operation of the plan . . . [and] a statistical summary indicating the operation of the plan . . . [and that such] information should be made available to the bench, the bar and the law schools to encourage them to make their contribution to the resolution of this difficult and persistent problem" (*ibid.*). Finally, the Conference directed that the plans which had been reported to it, together with the statistical data on the operation of the plans during the first 11 months of 1973, be made available "to all circuit judges, law book and periodical publishers, law reviews and to the Commission on Revision of the Federal Court Appellate System" (*id.* 12-13).

[14]In the same vein, Senior Seventh Circuit Judge Hastings has referred to experimental nature of the Seventh Circuit's plan: "It should also be borne in mind that the current plan of the Seventh Circuit is purposely being carried out on an experimental basis and, given further experience, hopefully may achieve some final form." He pointed out that dispositions by unpublished orders dropped from 62% in the last 11 months of 1973 to 46% in 1974 and 47% in the first 10 months of 1975. 51 Ind. L.J. 367, 371 (1976), cited *supra*, p. 8, fn. 6. In concluding his article, he said (p. 373): "In sum, I think it is fair to say that the Seventh Circuit Plan is being generally well received by responsible groups and members of the bar. There is positive approval of the trend toward reducing the unlimited proliferation of published opinions . . . We are encouraged to believe that further study will result in a viable plan well-suited to promote the administration of justice on the appellate level in the federal system."

It is thus seen that the Conference is acutely concerned, as were the Advisory Council for Appellate Justice and the Federal Judicial Center, with the burden upon overworked judges of the courts of appeals of writing opinions and that it encourages the ongoing experimentation with plans to relieve the burden in some measure by dispensing with formal published opinions in the traditional mold in cases in which the decision has no precedential value and therefore does not warrant publication.

Having been made aware of the problem by the action of the Conference, the Commission on Revision of the Federal Court Appellate System made its independent study. In its report entitled *Structure and Internal Procedures: Recommendations for Change* (1975), the Commission likewise referred (p. 50) to the "time-consuming" efforts involved in the writing of opinions[15] and it agreed that "a change in opinion-writing practices offers a court beleagured [*sic*] by ever-mounting caseloads the possibility of significant relief." The Commission' "strongly encourage[d] selective publication of opinions" (*id.* 51) as a means of saving time, pointing out that in preparing dispositions which "have no precedent value" and should therefore not be published, judges do not "sense quite the same need to polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution." The Commission also pointed out that "[w]hen large numbers of . . . opinions [having no precedential value] find their way into the reports, they create logistical problems in

[15]The Commission referred to a 1971-72 time study in the Third Circuit which showed that "48.2 percent . . . of all the time . . . [the judges] spent on cases was devoted to the writing and clearing of opinions" (*id.* 49).

terms of sheer space and library maintenance expenditures, and the burden of fruitless research is compounded" (*id.* 50).

The Commission declined to take a stand on the question of allowing the citation of unpublished decisions. "The Judicial Conference of the United States retains a continuing interest in the resolution of these problems; experimentation in the various circuits is continuing; empirical data are being collected; a range of alternatives is being explored. We recognize the Judicial Conference as an appropriate forum and do not believe that it would serve a useful function for the Commission to attempt, by specific recommendation, to foreclose that further study which the problem deserves" (*id.* 52).

The American Bar Association Commission on Standards of Judicial Administration has also recommended that publication of opinions be limited. In its report entitled *Standards Relating to Appellate Courts, Tentative Draft, 1976* (pp. 64-65), it adopted almost *in haec verba* the standards for publication recommended by the Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice (*supra*, p. 16) and added a standard calling for publication when an opinion "applies an established rule to a novel situation." At the time of the publication of its tentative draft the Commission had not arrived at a position as between a rule prohibiting the citation of an unpublished decision and a rule allowing citation but requiring a person who refers to such a decision to provide copies to the court and the opposing parties (*id.* 64). The Commission noted that courts with limited publication plans "ususally" forbid citation of unpublished decisions and it added, significantly, that "[w]hether or not a non-citation rule is adopted it is essential that courts treat opinions that are not formally published as having no value as prece-

dent in the decision of subsequent cases. If the courts consistently ignore unpublished opinions in their own decisions, the question of citation can be rendered practically unimportant; if they give them any weight at all, the non-publication procedure will inevitably be undermined" (*id.* 66).

The consensus is, therefore, that appellate courts must, for all the reasons advanced by those who have considered the problem, reduce the burden upon judges of writing opinions for publication.

Pursuant to the initiative of the Judicial Conference to which we have referred, opinion publication plans to accomplish that objective are now in operation in all of the courts of appeals. For the information of the Court we set forth in the appendix the plans of the other circuits in operation as of December 31, 1975, and the Seventh Circuit's current Rule 35. Some circuits (District of Columbia, Fourth, Seventh and Ninth) have adopted specific standards for publication based upon the recommendations of the Committee on Use of Appellate Court Energies. Others have adopted more general criteria for publication (*First Circuit*: "whether the district courts, future litigants, or we ourselves would be likely to benefit from the opportunity to read or cite the opinion;" *Second Circuit*: "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion" the decisions are not published; *Third Circuit*: "[w]hile there is no presumption against publication of signed opinions, there should be publication only where the case has precedential or institutional value;" *Sixth Circuit*: "[i]n all other cases [than cases involving an appeal from or petition to review a reported decision] the opinion of the court is published only if a judge participating in the decision considers the opinion to be

of precedential value;" *Eighth Circuit*: "a disposition without opinion or the nonpublication of an opinion "mean[s] that an opinion in the case will not add to the body of law and will not have value as precedent;" *Tenth Circuit*: "[t]he disposition without opinion . . . mean[s] that no new points of law, making the decision of value as a precedent, are believed to be involved)."[16]

The plans of the District of Columbia, First, Second, Sixth, Seventh, Eighth and Ninth Circuits expressly forbid the citation of unpublished decisions. The Tenth Circuit allows citation of an unpublished opinion, but requires the citing party to serve a copy upon opposing counsel. The plans of the Third, Fourth and Fifth Circuits are silent on the subject. However, in *Jones* v. *Superintendent, Virginia State Farm,* 465 F. 2d 1091, 1094 (1972), the Fourth Circuit said that it "prefers that

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[16]The Fifth Circuit's plan states that "The unlimited proliferation of published opinions is undesirable because it tends to impair the development of a cohesive body of law." The plan states that "[o]ver four years' experience clearly demonstrates that the [court's] screening and classification of cases and the use of the summary calendar . . . constitute an effective technique in implementing our declared basic policy" of "reduc[ing] the volume of published opinions." The plan states that the court's Rule 21 also implements that policy. That rule provides: "When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and that the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

"In such case, the court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or 'ENFORCED. See Local Rule 21.'"

. . . [its unpublished memorandum decisions] not be cited to us" and that "we will not ourselves in published opinions cite or refer to memorandum decisions."

It is clear, therefore, that a large majority of circuit judges who have expressed themselves on the subject have decided that a rule forbidding citation of unpublished decisions is a logical and necessary corollary of a plan to accomplish the primary objective of relieving them of writing for publication in cases in which the decision has no precedential value. Such a rule follows logically from the concept that a court should write for publication only in cases in which the decision should be incorporated into the body of precedent or, as the Committee on Use of Appellate Court Energies put it, when the decision "provide[s] the stuff of the law: to permit an understanding of legal doctrine, and to accommodate legal doctrine to changing conditions" (*supra,* p. 14).

Conversely, the premise of the unpublished disposition is that it contributes nothing to the body of precedent in that the case involves, e.g., only a question of the sufficiency of evidence to support the conclusion below, or no substantial question of law, or merely the application of a recognized rule of law to the particular circumstances of the case, as in *Valentino* v. *Lynch,* the unpublished decision upon which petitioners rely to support their claim of entitlement to a three-judge court. Dispositions in such cases are intended primarily for the benefit of the litigants. They know the case, hence considerably less thorough exposition is needed.

The Committee on Use of Appellate Court Energies cited five reasons supporting the necessity of including a rule of non-citation in a plan to dispense with the publication of non-precedential decisions (*supra,* p. 15). We need not repeat all of them here. Perhaps the most compelling reason is that to allow the citation of unpublished

decisions would frustrate the very purpose underlying non-publication in that it would create pressures upon judges to include in opinions not designed for publication details of fact and reasoning which are wholly unnecessary to the disposition. There might thus be created a secondary system of unofficial publication which, again, would undermine the purpose of the non-publication rule.

As against this impressive array of authority, petitioners would have this Court strike down the non-citation rule as a "prior restraint upon freedom of speech" and an impingement upon the "right to petition the government for redress of grievances" (Pet. 8-9). Their contentions are specious. In the last analysis their case against the rule is grounded in the doctrine of *stare decisis* which, simply defined, means that the decisions of courts should stand as precedents. It is a judicially-created policy; it is not enshrined in the Constitution. Courts do modify and overrule their prior decisions. By definition, therefore, courts do have authority to determine whether a given decision has value as a precedent for future cases, and, correspondingly, whether it should be published to the world. If it does not have such value, publication would serve no useful purpose and, by the same token, it would serve no useful purpose to permit the decision to be cited to or by the court. And so it is that a substantial majority of the circuits are persuaded that a non-citation rule is, logically and necessarily, an appropriate and integral part of the larger plan to relieve the burdens upon all concerned-judges, lawyers, publishers and library services-engendered by the proliferation of published opinions in cases having no precedential value.[17]

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[17]Petitioners' assertion (Pet. 11) that the non-citation rule would foster the creation of a "system of private law" is unworthy. Unpublished decisions prepared, not to be incorporated into the body

To summarize, we submit that there is a coalescence of considerations which militate against petitioners' plea that this Court should, in the exercise of its discretion, undertake in this case to decide the question of the validity of the Seventh Circuit's non-citation rule.

First, of course, as we have shown in Point I, the question petitioners sought to raise in their underlying suit as to the constitutionality of the Illinois statute on the ground that it permitted revocation of their license without a prior hearing and their concomitant claim of entitlement to a three-judge court to hear their suit (pursuant to a statute which, incidentally, was recently repealed, *supra*, p. 3) became matters of only academic interest when petitioners were accorded the prior hearing which they claimed in the first place was their right. It is thus pointless for them to continue to press the three-judge court question on the basis of an earlier unpublished and therefore uncitable Seventh Circuit decision, a decision which, in any event, is wholly inapposite in their case.

Second, petitioners would have this Court intervene in an ongoing process of experimentation with opinion publication plans in the various circuits. Study of the question of allowing *vel non* the citation of an unpublished decision as a precedent is a part of that process. We have seen that the Seventh Circuit recently amended its plan to allow any person who can show cause therefor to move the court to lift its restriction against citation of such a decision. In these circumstances, we respectfully

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of precedent, but only for the information of the parties are, of course, part of the public records of a court. We note in this connection that the plans of the Third, Fourth, Fifth, Sixth and Seventh Circuits provide for the periodic listing of unpublished dispositions in the Federal Reporter.

submit that the Court should withhold its hand in this case and should await another day when a non-citation rule may be really crucial in some future petitioners' case.

CONCLUSION

The motion for leave to file a petition for writs of mandamus and prohibition should be denied.

Respectfully submitted.

ROBERT S. ERDAHL,
Counsel for respondents
The United States Court
of Appeals for the Seventh
Circuit and each circuit
judge in regular active
service thereon.

AUGUST 1976

DOJ-1976-08

APPENDIX

OPINION PUBLICATION PLANS OF THE UNITED STATES COURTS OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

December 22, 1972
(Revised April 17, 1973)

PLAN FOR PUBLICATION OF OPINIONS

POLICY

Publishing

The Court will take action to achieve the publication of all written opinions and items identifying orders and judgments pertaining to its cases.

Precedent

Published opinions of the Court may be cited as precedents. However, orders, judgments, and/or associated memoranda, whether published as a result of Court action or not, may not be cited as precedents.

Decision to File

A Judge of the Court may file an opinion on any matter brought before him for decision and may utilize facilities of the Court to achieve publication of that opinion. However, all Judges are urged to base their decision in each case as to the need for and utility of an opinion upon the criteria established in the Implementation section below.

Public Access

All opinions, orders, and judgments of the Court which are filed with the Clerk of the Court are part of the public records of the Court, whether published or not, and are accessible to the public upon application, in accordance with normal procedures.

Definition

The expression "action to achieve publication," as used in this Plan, means that the Court arranges for the duplication of opinions for regular subscribers and takes action to forward opinions and identifying elements of orders and judgments to publishing companies for publication.

Implementation

Criteria

The Court contemplates that an opinion will be written and published where one or more of the following criteria is satisfied:

a. It establishes a rule of law on a point of first impression for the court, or alters or modifies a rule of law previously announced.

b. It involves a legal issue of unusual or continuing public interest.

c. It criticizes existing law.

d. It is considered a significant contribution to legal literature, e.g., through historical resolution of an apparent conflict in opinions, by furnishing an analysis of the rationale and policy or content of a rule of law.

e. It applies an established rule of law to a factual situation significantly different from that in published cases.

Action is not to be taken by the Court to write opinions in cases involving routine application of established principles of law to a particular set of facts. Identification of a rule or rules of law applied to particular facts may be made in an order or judgment of the Court or in a memorandum attached thereto. In view of the implicit assumption that the judgment is based upon a mere

application of one or more settled rules, neither the judgment nor any explanatory memorandum filed therewith, may be cited as precedent in this Circuit by counsel or the Court. The judgment may, of course, be applied in connection with such matters as a claim of *res judicata,* collateral estoppel, or law of the case.

Decision Process

Determination as to the form of record of the decision of the Court and the assignment of a Judge as author should be made, whenever feasible, at the case conference. The assigned Judge may in the course of carrying out his assignment, ask panel reconsideration of the form of decision to be used.

The Court may, if it deems useful and feasible, take action to achieve publication of only portions of an opinion, and may express the remainder in memorandum form attached to a judgment.

Determination by a majority of a panel that an opinion is not required in a case shall not be binding upon a third judge who may, if he deems appropriate, write a dissenting or concurring opinion. In such event, the Court shall take action to achieve publication of the opinion in the same manner as for any other opinion of the Court.

Internal Circulation

Except in cases requiring emergency action, all opinions are to be circulated for the information of all Judges of the Court prior to issuance. This procedure does not apply to orders and judgments and their supporting memoranda.

Effective Date

This Plan is effective for implementation on January 1, 1973.

FIRST CIRCUIT

PLAN FOR THE PUBLICATION OF OPINIONS

The Judicial Council of the First Circuit, pursuant to a resolution of the Judicial Conference of the United States, hereby adopts the following plan for the publication of opinions of the United States Court of Appeals for the First Circuit.

(a) STATEMENT OF POLICY.

In the past several years the number of appeals on the regular docket which have been disposed of by something less than a published opinion (i.e., a simple order, a memorandum and order, or an unpublished opinion) has ranged from 45 per cent in 1967 to 61 per cent in 1972. This has been accomplished without any deliberate or sustained effort to minimize publication.

While we do not presently attempt to categorize the criteria which should determine publication, we are confident that a significantly larger proportion of cases will result in unpublished decisions if the court adopts a policy of self conscious scrutiny of the publishworthiness of each disposition coupled with a presumption, in the absence of justification, against publication.

Our test, broadly phrased, is whether the district courts, future litigants, or we ourselves would be likely to benefit from the opportunity to read or cite the opinion, having in mind that only published opinions may be cited. We therefore impose upon ourselves the responsibility of subjecting every disposition to scrutiny and an affirmative justification for publication. We do not now attempt to quantify the weight of the presumption against publication, preferring to leave further elaboration to experience.

(b) MANNER OF IMPLEMENTATION.

1. As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition (order, memorandum and order, unpublished opinion, published opinion).

2. At conference the mode of disposition shall be discussed and, if feasible, be provisionally agreed upon. Such an agreement shall not be binding upon the writer if further reflection and research persuade him to depart therefrom.

3. The writer of an opinion shall have the responsibility, in the cover letter accompanying the draft to be circulated, to recommend publication, if such is his view, giving such reason as to him seems sufficient. In the absence of objection, the opinion shall be published.

4. While the other members of the panel shall give the writer due consideration, on suggestion of another member that the opinion should not be published, the third member shall cast the deciding vote. Alternatively, although the writing judge does not recommend publication, another member of the panel may. If there is no objection, the opinion shall be published; if objection appears, a majority vote shall decide.

5. In circumstances where the discussion of a significant point can be fairly presented without reproduction of facts and rulings irrelevant to that point, a judge may propose the partial publication of an opinion, with only the parties receiving the full opinion.

6. Only published opinions may be cited. If a district court opinion is published, the final order affirming, reversing, or otherwise disposing of the case should also be published.

7. Periodically, the court shall conduct a review in an effort to improve its publication policy and implementation. This plan shall be published with the rules of the court. Comments and suggestions of bench and bar shall be welcomed.

SECOND CIRCUIT

RULE §0.23. Dispositions in Open Court or by Summary Order:

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

THIRD CIRCUIT

Plan for Publication of Opinions

1. *Policy.* This Court publishes all signed opinions except where the panel, or court in banc, by majority vote, decides not to publish. While there is no presumption against publication of signed opinions, there should be publication only where the case has precedental or institutional value. An opinion which has value only to the trial court or litigants should not be published.

2. *Non-Publication Procedure.* The panel may decide at conference whether the proposed opinion shall be published. Thereafter, following the preparation of the opinion, the opinion-writer may suggest that his opinion not be published. Under either procedure, the publication determination is decided by a majority vote.

3. *Filing Opinions not to be Published.* The opinion-writer indicates on the typescript copy that the opinion is not for publication. The Clerk includes the terminations of such cases in the tables sent to West Publishing Company and Equity Publishing Corporation described in D5.

4. *Per Curiam Opinions.* There is a presumption against publication of per curiam opinions. Unless the typescript copy affirmatively indicates that a per curiam opinion is for publication, the Clerk shall not cause it to be published.

5. *Judgment Order.* The text of judgment orders will not be published. The results in each case will be recorded by a table to be published from time to time in the Federal Reporter Series of West Publishing Company and, in Virgin Islands cases, in the Virgin Islands Reports of Equity Publishing Corporation.

FOURTH CIRCUIT

PLAN FOR PUBLICATION OF OPINIONS

The Judicial Council of the Fourth Circuit, pursuant to a resolution of the Judicial Conference of the United States, hereby adopts the following Plan for the Publication of Opinions of the United States Court of Appeals for the Fourth Circuit.

- I -

BASIC POLICY

A presumption against publication of opinions is hereby established.

- II -

CRITERIA FOR PUBLICATION OF OPINIONS

An opinoion shall not be published unless it meets one of the following criteria for publication.

(a) It establishes, alters or modifies a rule of law, or

(b) It involves a legal issue of continuing public interest, or

(c) It criticizes existing law, or

(d) It is a disposition involving an historical review of the law that is not duplicative or solves or creates a conflict in the law, or

(e) It is in a case in which there is a published opinion below.

- III -

RESPONSIBILITY FOR DETERMINING WHETHER OR NOT TO PUBLISH OPINIONS

The decision to publish or not to publish shall be made by the author.

- IV -

DISPOSITIONS WITHOUT PUBLISHED OPINIONS

Unpublished opinions shall be listed periodically in the Federal Reporter by title, docket number, date, district, agency and Federal Supplement citation (if reported).

- V -

EFFECTIVE DATE

This plan shall be, and become, effective on January 1, 1973.

FIFTH CIRCUIT

PLAN FOR PUBLICATION OF OPINIONS

The Judicial Council of the Fifth Circuit, in accordance with a resolution of the Judical Conference of the United States, hereby adopts the following plan with respect to the publication of opinions of the United States Court of Appeals for the Fifth Circuit.

I

BASIC POLICY

The unlimited proliferation of published opinions is undesirable because it tends to impair the development of a cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions. Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.

II

PROCEDURES TO ACCOMPLISH BASIC POLICY

Over four years' experience clearly demonstrates that the screening and classification of cases and the use of the summary calendar as provided by Local Rule 18

constitute an effective technique in implementing our declared basic policy. 28 U.S.C. Rule 18 (5th Cir., Supp. 1972), Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 431 F. 2d 409, Part 1 (5th Cir. 1970).

Such basic policy is further implemented by Local Rule 21 providing for affirmance without opinion. 28 U.S.C. Rule 21 (5th Cir., Supp. 1972), N. L. R. B. v. Amalgamated Clothing Workers of America, 430 F. 2d 966 (5th Cir. 1970).

III

PUBLICATION

Signed and per curiam opinions will be published. Affirmances without opinion in accordance with Local Rule 21 are to be published only in Table Form. See 467 F. 2d 944 (5th Cir. 1972).

IV

EFFECTIVE DATE

This plan shall be effective commencing on the *8th* day of *February*, 1973.

SIXTH CIRCUIT

OPINION PUBLICATION PLAN

1. In all cases involving an appeal from or petition to review a reported decision, the opinion or order of this court is designated for publication in Federal Reporter and is available for publication by other publishers.

2. In all other cases the opinion of the court is published only if a judge participating in the decision considers the opinion to be of precedential value.

3. A list of the titles and docket numbers of all cases terminated after hearing or submission to a panel by an unpublished opinion or order is submitted periodically to West Publishing Company for publication in Federal Reporter.

4. Unpublished opinions or orders are law of the case in which they were rendered, but they are not to be cited by the court or to the court.

The operation of the plan has resulted in six categories of case dispositions:

1. *Published Opinions.* Opinions designated for publication are filed in printed slip opinion form. The printed slip opinion is filed on the date of its receipt from the printer, and copies are distributed on that date to counsel of record, the tribunal whose decision is under review and to West Publishing Company and other publishers for publication.

2. *Published Orders.* Orders designated for Publication usually are not printed. The original typewritten order is filed on the date of its receipt from the court, and copies are distributed on that date to counsel of record, the tribunal whose decision is under review and to the various publishers.

3. *Unpublished Opinions.* Since copies of all printed slip opinions are distributed to all district judges of the circuit, opinions occasionally are printed in slip form but designated not for publication when it is determined by the court that the opinion would have sufficient interest for the district judges but not sufficient precedential value to justify publication in Federal Reporter. Opinions designated not for publication are filed in printed slip form, and copies are distributed to counsel of record, the tribunal below and all district judges of the circuit. Copies of the

printed slip opinion are not distributed to the various publishers, however.

4. *Unprinted Opinions.* Opinions designated not for printing or publication are filed in typewritten form, and copies are served on counsel of record and the tribunal whose decision is under review. Copies are not sent to any publisher, nor are copies distributed to the district judges of the circuit.

5. *Orders Entered after Hearing or Submission.* Orders are filed in typewritten form, and distribution is the same as with unprinted opinions.

6. *Orders Entered Upon Motion or Stipulation or by the Court Pursuant to Local Rules 3(e), 8 and 9.*

SEVENTH CIRCUIT

(as revised, effective July 1, 1976)

ARTICLE III. PUBLICATION RULE

Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) *Policy.* It is the policy of this circuit to reduce the proliferation of published opinions.

(b) *Publication.* The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machine;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata,* collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

(c) *Guidelines for Method of Disposition.*

(1) Published opinions:

Shall be filed in signed or percuriam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) *Disposition is to be by Order or Opinion.*

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

EIGHTH CIRCUIT

PLAN FOR PUBLICATION OF OPINIONS

The Judicial Council of the Eighth Circuit, pursuant to a resolution of the Judicial Conference of the United States, hereby adopts the following plan for the preparation and publication of opinions of the United States Court of Appeals for the Eighth Circuit.

1. It is unnecessary for the Court to write an opinion in every case or to publish every opinion written. The disposition without opinion or the nonpublication of an opinion does not mean that the case is considered unimportant. It does mean that an opinion in the case will not add to the body of law and will not have value as precedent.

2. An opinion will not be written in cases disposed of under Local Rule 14.

3. The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his opinions available for publication. The decision on publication of an opinion will ordinarily be made prior to its preparation. The direction as to publication will appear on the face of the opinion. Un published opinions, since they are unreported and not uniformly available to all parties, may not be cited or otherwise used in any proceedings before this or any other court except when the cases are related by virtue of an identity between the parties or the causes of action.

4. An opinion should be published when the case or opinion:

(a) establishes a new rule of law or questions or changes an existing rule of law in this Circuit,

(b) is a new interpretation of or conflicts with a decision of a federal or state appellate court,

(c) applies an established rule of law to a factual situation significantly different from that in published opinions,

(d) involves a legal or factual issue of continuing or unusual public or legal interest,

(e) does not accept the rationale of a previously published opinion in that case, or

(f) is a significant contribution to legal literature through historical review or resolution of an apparent conflict.

ADOPTED:

January 11, 1973.

NINTH CIRCUIT

Form and Publication of Disposition of Cases

(a) Opinions, Memoranda, Orders; Publication. Each written disposition of a matter before this court shall bear under the number in the caption an appropriate label, that is, OPINION, MEMORANDUM, or ORDER.

A written reasoned diposition of a case which is intended for publication is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM. Any

other disposition of a matter before the Court is an ORDER. An ORDER or MEMORANDUM shall not reveal its author, nor shall its authorship be designated "Per Curiam."

PUBLICATION means making available for reporting by legal publishing companies, or for distribution to regular subscribers, written dispositions which have been printed as slip opinions, or copies of which have been prepared by any other means.

Publication as a matter of course shall apply only to opinions.

(b) When Disposition to be by Opinion. Subject to subsection (d) hereof, a case shall not be disposed of by written opinion for publication unless it:

(1) Establishes, alters, modifies or clarifies a rule of law, or

(2) Calls attention to a rule of law which appears to have been generally overlooked, or

(3) Criticizes existing law, or

(4) Involves a legal or factual issue of unique interest or substantial public importance, or

(5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or

(6) Is accompanied by a separate concurring or dissenting expression, and the author or such separate expression desires that it be reported or distributed to regular subscribers.

(c) Dispositions as Precedent. A disposition which is not for publication will not be regarded as precedent in this Court and shall not be cited to this Court in briefs

or oral argument; Provided, any disposition of this Court may be referred to on the question of whether such disposition establishes the law of the case.

(d) Designation for Publication. A disposition other than an opinion may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated at the end of the disposition when filed with the Clerk by the addition of the words "For Publication" on a separate line.

(e) Preliminary Determination to Publish. The preliminary determination whether the disposition should be published should be made at the first conference following oral argument, or if the disposition is made without oral argument, before it is filed with the Clerk.

(f) Mandatory Designation for Publication. When an opinion has been published by the district court or any administrative agency, this court's opinion, memorandum or order disposing of the appeal or petition shall be designated for publication. If a majority of a panel has written a disposition in such a case which is not ordinarily subject to publication, a separate page shall be added to the disposition designating for publication only the dispositive judgment or order of the court.

Effective April 1, 1974.

TENTH CIRCUIT

RULE 17

OPINIONS

(a) It is unnecessary for the Court to write opinions in every case. The disposition without opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are believed to be involved.

(b) After argument when the Court determines that one or more of the following circumstances exist and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and (4) that no error of law appears; the Court may in its discretion and without written opinion enter either of the following orders: "AFFIRMED. See Rule 17(b)", or "ENFORCED. See Rule 17(b)".

(c) The Court or a panel thereof will determine when an opinion shall be published and will direct the Clerk accordingly. The direction will appear on the face of the opinion. Unpublished opinions, although unreported and not uniformly available to all of the parties, can nevertheless be cited, if relevant, in proceedings before this or any other court. Counsel citing same shall serve a copy of the unpublished opinion upon opposing counsel.

(d) Situations where publication shall occur include (1) conflicts with decisions of the Tenth Circuit or other federal appellate courts; the interpretation of decisions of the highest court of a State or the Supreme Court of the United States; (2) new federal constitutional or statutory issues; and (3) diversity cases in which a new or unique proposition of law is expounded.

(e) Situations where publication should not occur include (1) cases where the outcome depends on facts and presents no legal issues not previously decided by the Tenth Circuit or by the Supreme Court of the United States; and (2) diversity cases where the outcome depends on established State law.

(f) When an opinion has been previously published by a district court, any administrative agency or the Tax Court, this Court's opinion, memorandum, or order disposing of the appeal or petition shall be designated for publication. If a majority of a panel has written a disposition in such a case which would not ordinarily be published, a separate page shall be added to the disposition designating for publication only the dispositive judgment or order of the Court.

Supreme Court, U. S.
FILED
JUL 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1404, Misc.

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and each Circuit Judge in regular active service thereon,

Respondents.

PETITIONERS' MEMORANDUM IN REPLY TO MICHAEL J. HOWLETT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO POINT I OF HOWLETT'S BRIEF

The Issue Of The Validity Of Seventh Circuit Rule 28 Is Not Moot.

The Attorney General of Illinois, responding only on behalf of Michael J. Howlett, who is not named as a Respondent in the instant proceedings (See Howlett's Brief at 3), contends that the publication of *Valentino v. Howlett*, 528 F. 2d 975 (7th Cir. 1976), has rendered moot Petitioners' attack on the validity of Seventh Circuit Rule 28.

The opinion in *Valentino v. Howlett* is distinct from the opinion in *Valentino v. Lynch*. (The *Valentino v. Lynch* unpublished opinion is reproduced as Appendix B to the Petition). The *Valentino v. Howlett* opinion merely makes mention of the *Valentino v. Lynch* interlocutory proceedings. The *Valentino v. Howlett* opinion sets forth none of the legal reasoning crucial to an understanding of the *Valentino v. Lynch* ruling. The *Valentino v. Lynch* opinion, which provides this legal reasoning, remains unpublished and to this day its citation is prohibited by Seventh Circuit Rule 28.

Accordingly, Howlett's contention is without merit.

PETITIONERS' REPLY TO POINT II OF HOWLETT'S BRIEF

The Issue Of Whether Petitioners Have A Right To A Three-Judge Court Is Not Before This Court.

In this proceeding Petitioners seek as relief, *inter alia*, an order upon the Seventh Circuit "to consider, in light of *Valentino v. Lynch*," the mandamus petition previously denied by the Seventh Circuit. They do not seek as relief an order by this Court convening a three-judge court.

In *Valentino v. Lynch*, the Seventh Circuit ordered the convention of a three-judge court. Yet Petitioners were not permitted to cite *Valentino v. Lynch* when they requested a similar ruling from the Seventh Circuit in a case Petitioners consider to be "on all fours" with *Valentino v. Lynch*. It is telling that Howlett, in his argument before this Court, omits any discussion on the merits of *Valentino v. Lynch*.

PETITIONERS' REPLY TO POINT III OF HOWLETT'S BRIEF

The Relief Sought Is Available Only In This Court.

Howlett, in his response, admits the significance of *Valentino v. Lynch* by stating "[t]he only case cited by petitioners where a writ was issued was in the *Valentino* [*v. Lynch*] unpublished order. (Howlett's Response at 15).[1]

The Seventh Circuit, by its Rule 28, prohibited Petitioners' reliance on *Valentino v. Lynch*. In seeking affirmation of their First and Fourteenth Amendment rights, Petitioners are without recourse except to this Court. (See Point II of the Petition)

[1] Howlett's assertion that Petitioners' action in the Northern District of Illinois constitutes merely a claim that a statute is applied unconstitutionally is incorrect. Petitioners clearly attack the statute on its face. Accordingly, the affidavit of Secretary of State employee Jay L. Mesi, concerning his interpretation of the challenged statute, which Howlett has bandied about in the Court and in the Seventh Circuit, is not determinative. Moreover, the affidavit, evidentiary matter, was never submitted to the District Court wherein Petitioner would have an opportunity to cross-examine its maker.

CONCLUSION

The Seventh Circuit's response to the Petition remains to be filed. Nothing in Secretary Howlett's response satisfactorily addresses the only issue raised in the Petition: the validity of Seventh Circuit Rule 28.

Respectfully submitted,

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PETITIONERS' MEMORANDUM IN REPLY TO THE SEVENTH CIRCUIT'S BRIEF IN OPPOSITION

PETITIONERS' REPLY TO JURISDICTIONAL STATEMENT OF THE SEVENTH CIRCUIT'S BRIEF

The Seventh Circuit's Brief Misconstrues The Nature Of The Relief Sought By Petitioner.

The Seventh Circuit's Brief posits two situations in which litigants might request this Court to mandate the convening of a three-judge district court: where a

single judge has acted[1] and where action is imminent.[2] The attempted distinction is tenuous and, in any event, inapplicable to this case. Petitioners do not seek from this Court an order directing the convening of a three-judge court. Petitioners argue merely that the Seventh Circuit should permit citation of *Valentino v. Lynch* and deal accordingly with that opinion.

Nowhere in its brief does the Seventh Circuit dispute Petitioners' contention (set forth as Point II of the Petition) that, if relief is to be accorded Petitioners in a judicial forum, it is available only in this Court. Accordingly, writs of mandamus and prohibition are appropriate. Petitioners challenge the procedure by which the Seventh Circuit considered the mandamus petition presented to it. Such a challenge justifies extraordinary relief. Any argument concerning the appropriateness of mandamus or prohibition writs vis-à-vis certiorari is, as the Seventh Circuit recognizes (in footnote 3 of its Brief), in large part academic. This Court, in its discretion, frequently has treated petitions for mandamus or prohibition as petitions for certiorari. Petitioners maintain, however, that mandamus and prohibition are appropriate writs in this case.

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[1] *Ex Parte Northern Pac. R. Co.*, 280 U.S. 142 (1929); *Ex Parte Cogdell*, 342 U.S. 163 (1951)—actions challenging constitutionality of legislation dismissed by a single judge as against contentions that three-judge courts were required.

[2] In the instant case, the single district judge already has denied Petitioner's Motion to Convene a Three Judge Court, and a Motion to Dismiss has been filed (but not yet briefed by Howlett).

PETITIONERS' REPLY TO POINT I OF THE SEVENTH CIRCUIT'S BRIEF

Respondents Would Have This Court Declare The Underlying Lawsuit Dismissed, Although The Defendant Howlett Has Yet To Brief His Motion To Dismiss, Which Has Been Pending In The District Court These Past Thirteen Months.

The crux of Respondent's "mootness" argument focuses upon an affidavit filed, not in the district court, but for the first time in the Court of Appeals. The affidavit essentially states that no matter what the challenged statute provides or fails to provide on its face, Howlett's administration interprets and administers it in a constitutional manner.

Petitioners' license to operate their auto sales dealership was revoked July 2, 1975, without prior notice or hearing. Subsequently, Petitioners, through their counsel, spoke with officers and administrators of the Illinois Secretary of State's office in an attempt to obtain rescission of the revocation order pending a formal hearing. Howlett's office refused this relief. Only upon such refusal did Petitioners institute their federal court action. At no time during the July 23, 1975, argument on Petitioners' Motion for a Temporary Restraining Order did Howlett's counsel allege that the revocation without prior hearing had been a mistake. Upon the entry of the restraining order Jay L. Mesi (the affiant) restored the license, and during conversations with Petitioners' counsel, he at no time indicated that the revocation without prior hearing had been a mistake. Between July, 1975, when the restraining order was granted, and January, 1976, when the mandamus petition was filed in the Seventh Circuit, various proceedings in this case were conducted in the district

court. At no time, verbally or in written memoranda, did Howlett during those six months contend that the revocation without prior hearing had been a mistake! Only after the mandamus petition was filed in the Seventh Circuit, and Howlett obtained new counsel (the Illinois Attorney General's appellate division), did Jay L. Mesi execute and submit the affidavit.

The challenged statute, unlike other Illinois statutes providing for license suspension or revocation, contains no provision for a prior hearing. The grounds upon which Petitioners' auto dealer's license was revoked without prior hearing (alleged failure to post hours of business and alleged failure to maintain certain records) certainly cannot purport to have constituted a public emergency. Yet, in order to obtain a hearing without the disadvantage of being precluded from operating their business pending the administrative proceedings, Petitioners were forced to incur the expense and burden of instituting a federal lawsuit.[3]

Petitioners have brought this suit as a class action. While Howlett may restore a revoked license pending hearing to auto dealers who win federal court restraining orders, the statute is not rendered constitutional nor its effect on the class of auto dealers less burdensome thereby.

[3] While Respondents accuse Petitioners of "dilatory tactics," it should be noted that no representative for Howlett has bothered to appear in the district court for status calls during the past several months and that Howlett has not yet submitted a memorandum in support of the Motion to Dismiss he filed over one year ago. Rule 13 of the Northern District Rules requires the submission of such a memorandum, and Howlett, by Motion filed by Petitioners, has been on notice of the necessity for a memorandum these past eleven months.

PETITIONERS' REPLY TO POINT II OF THE SEVENTH CIRCUIT'S BRIEF

There Exist Strong Indications That The Rule Forbidding Citation Of Unpublished Opinions Has Not Been Well Received By Responsible Groups And Members Of The Bar.

Although the rule Petitioners challenge is part of a plan characterized by the Seventh Circuit's Brief as "experimental,"[4] the rule has been in effect over 3 1/2 years. During this time the rule, on the average, has been applied to at least fifty percent of all opinions issued by the Seventh Circuit.[5]

The Chicago Bar Association has issued a report critical of the nonpublication/noncitation rule. Petitioners have been informed that, in this case, the Solicitor General and the Civil Division of the Justice Department, because of their opposition to the challenged rule, declined to represent the Seventh Circuit. A similar Ninth Circuit rule has been critized in an American Bar Association publication.[6]

[4] The challenged rule and the plan of which it is a part lacks the fundamental requisites of an experiment, such as randomization and control. The rule and plan fail to set forth any recognizable method whereby internal validity (the *sine qua non* of any experiment) can be evaluated. "Internal validity is the basic minimum without which any experiment is uninterpretable: Did in fact the experimental treatment make a difference in the specific experimental instance?" D. CAMPBELL AND J. STANLEY, EXPERIMENTAL AND QUASI EXPERIMENTAL DESIGNS FOR RESEARCH 5 (1973). The nonpublication/noncitation "experiment" has no clearly defined duration and has many unwilling participants.

[5] Hastings, *The Seventh Circuit Plan For Publication of Opinions—A Continuing Experiment*, 51 Ind. L.J. 367, 371-373 (1976).

[6] Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?* 61 A.B.A.J. 1224 (1975).

It is impermissible to minimize the application of the challenged rule. Not only has the rule been applied in a great number of cases, it has been applied to quite lengthy opinions addressing a multiplicity of issues. Should this Court grant Petitioners' Motion for Leave to File the Petitions, and order further briefs, Petitioners are prepared to document, in detail, numerous instances in which opinions covering eight to fifteen typewritten pages, each addressing several well-briefed issues (some issues of first instance within the Circuit), were ordered not to be published or cited.

Petitioners assert that the judicial process is offended when a Court prepares one set of opinions for public scrutiny and another set for the purposes of a select few.[7] Petitioners emphasize that they do not raise any issue as to whether Circuit Judges should prepare written opinions. Petitioners merely contend that every opinion written should become part of the public law of the Circuit.

It does not follow, "by definition," as asserted in the Seventh Circuit's brief, that because it is within the province of judges to overrule and modify their prior decisions, it also is within their province to determine, prospectively, whether a given decision has value as precedent for future cases.

Circuit Courts of Appeals do not create law in a regional vacuum. This Court frequently bases its determination to review an issue based on the existence of a conflict between the Circuits. Petitioners' counsel have recognized instances in which Petitions for Certiorari

[7] This summer's amendment to the nonpublication/noncitation rule does not cure the basic objections to the rule, nor does it resolve the issues raised by these Petitioners.

have been brought before this Court by litigants within other Federal judicial circuits, unaware, because of the nonpublication/noncitation rule, that the issue they raised before their Circuit had been ruled upon by the Seventh Circuit in a conflicting manner. The impairment of ready access (via indexing systems and reporters) to the substance of unpublished opinions undermines this Court's reviewing power. Rules promulgated by the Circuit Courts of Appeal should prudently address themselves to procedures whereby the intent of the Federal Rules of Appellate Procedure can best be carried out in each Circuit. Local circuit rules should not modify or eliminate basic judicial functions or serve to impair further judicial review.

CONCLUSION

For the reasons expressed in the Petition, the Reply to Michael J. Howlett's Brief and this Reply to the Seventh Circuit's Brief, Petitioners pray this Court grant the Motion for Leave to File the Petition and grant the relief requested in the Petition.

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